

**INDIAN TRUST ASSET AND TRUST FUND
MANAGEMENT AND REFORM ACT**

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ONE HUNDRED SEVENTH CONGRESS
SECOND SESSION
ON
S. 2212

TO ESTABLISH A DIRECT LINE OF AUTHORITY FOR THE OFFICE OF TRUST REFORM IMPLEMENTATION AND OVERSIGHT TO OVERSEE THE MANAGEMENT AND REFORM OF INDIAN TRUST FUNDS AND ASSETS UNDER THE JURISDICTION OF THE DEPARTMENT OF THE INTERIOR, AND TO ADVANCE TRIBAL MANAGEMENT OF SUCH FUNDS AND ASSETS, PURSUANT TO THE INDIAN SELF-DETERMINATION ACT

JULY 30, 2002
WASHINGTON, DC



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INDIAN TRUST ASSET AND TRUST FUND MANAGEMENT AND REFORM ACT

TUESDAY, JULY 30, 2002

**U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.**

The committee met, pursuant to other business, at 11:35 a.m., in room 106, Dirksen Senate Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Campbell, Conrad, Johnson, McCain, and Thomas.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The Committee on Indian Affairs meets again this morning to receive testimony on S. 2212, the Indian Trust Asset and Trust Fund Management and Reform Act of 2002.

This measure was introduced on April 18, 2002 by Senator John McCain for himself and Senators Daschle and Johnson as a discussion draft bill.

The stated purpose of this bill is to establish a direct line of authority for the Office of Trust Reform Implementation and Oversight to oversee the management and reform on Indian trust funds and assets, and to advance tribal management of those trust funds and assets.

[Text of S. 2212 follows:]

107TH CONGRESS
2D SESSION

S. 2212

To establish a direct line of authority for the Office of Trust Reform Implementation and Oversight to oversee the management and reform of Indian trust funds and assets under the jurisdiction of the Department of the Interior, and to advance tribal management of such funds and assets, pursuant to the Indian Self-Determination Act and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 18, 2002

Mr. McCAIN (for himself, Mr. DASCHLE, and Mr. JOHNSON) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

A BILL

To establish a direct line of authority for the Office of Trust Reform Implementation and Oversight to oversee the management and reform of Indian trust funds and assets under the jurisdiction of the Department of the Interior, and to advance tribal management of such funds and assets, pursuant to the Indian Self-Determination Act and for other purposes.

1 *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Indian Trust Asset
3 and Trust Fund Management and Reform Act of 2002”.

**4 SEC. 2. DEPUTY SECRETARY FOR TRUST MANAGEMENT
5 AND REFORM.**

6 (a) DEFINITIONS.—Section 2 of the American Indian
7 Trust Fund Management Reform Act of 1994 (25 U.S.C.
8 4001) is amended—

9 (1) in paragraph (1), by striking “(1) The
10 term” and inserting the following:

11 “(8) SPECIAL TRUSTEE.—The term”;

12 (2) in paragraph (2), by striking “(2) The
13 term” and inserting the following:

14 “(4) INDIAN TRIBE.—The term”;

15 (3) in paragraph (3), by striking “(3) The
16 term” and inserting the following:

17 “(7) SECRETARY.—The term”;

18 (4) in paragraph (4), by striking “(4) The
19 term” and inserting the following:

20 “(5) OFFICE.—The term”;

21 (5) in paragraph (5), by striking “(5) The
22 term” and inserting the following:

23 “(1) BUREAU.—The term”;

24 (6) in paragraph (6), by striking “(6) The
25 term” and inserting the following:

26 “(2) DEPARTMENT.—The term”;

1 (7) by adding at the end the following:

2 “(3) DEPUTY SECRETARY.—The term ‘Deputy
3 Secretary’ means the Deputy Secretary for Trust
4 Management and Reform appointed under section
5 307(a)(2).

6 “(6) REFORM OFFICE.—The term ‘Reform Of-
7 fice’ means the Office of Trust Reform Implementa-
8 tion and Oversight established by section 307(e).”;

9 (8) by moving paragraphs (1) through (8) (as
10 redesignated by this subsection) so as to appear in
11 numerical order; and

12 (9) by adding at the end the following:

13 “(9) TRUST ASSETS.—The term ‘trust assets’
14 means all tangible property including land, minerals,
15 coal, oil and gas, forest resources, agricultural re-
16 sources, water and water sources, and fish and wild-
17 life held by the Secretary for the benefit of an In-
18 dian tribe or an individual member of an Indian
19 tribe pursuant to Federal law.

20 “(10) TRUST FUNDS.—The term ‘trust funds’
21 means all funds held by the Secretary for the benefit
22 of an Indian tribe or and individual member of an
23 Indian tribe pursuant to Federal law.”.

24 (b) DEPUTY SECRETARY FOR TRUST MANAGEMENT
25 AND REFORM.—Title III of the American Indian Trust

1 Fund Management Reform Act of 1994 (25 U.S.C. 4041
2 et seq.) is amended by adding at the end the following:

3 **“SEC. 307. DEPUTY SECRETARY FOR TRUST MANAGEMENT**

4 **AND REFORM.**

5 “(a) ESTABLISHMENT.—

6 “(1) IN GENERAL.—There is established within
7 the Department the position of Deputy Secretary for
8 Trust Management and Reform.

9 “(2) APPOINTMENT AND REMOVAL.—

10 “(A) APPOINTMENT.—The Deputy Secretary
11 shall be appointed by the President, by
12 and with the advice and consent of the Senate.

13 “(B) TERM.—The Deputy Secretary shall
14 be appointed for a term of 6 years.

15 “(C) REMOVAL.—The Deputy Secretary
16 may be removed only for good cause.

17 “(3) ADMINISTRATIVE AUTHORITY.—The Deputy
18 Secretary shall report directly to the Secretary.

19 “(4) COMPENSATION.—The Deputy Secretary
20 shall be paid at a rate determined by the Secretary
21 to be appropriate for the position, but not less than
22 the rate of basic pay prescribed for Level II of the
23 Executive Schedule under section 5313 of title 5,
24 United States Code.

25 “(b) DUTIES.—The Deputy Secretary shall—

1 “(1) oversee all trust fund and trust asset mat-
2 ters of the Department, including—

3 “(A) administration and management of
4 the Reform Office; and

5 “(B) financial and human resource matters
6 of the Reform Office; and

7 “(2) engage in appropriate government-to-gov-
8 ernment relations and consultations with Indian
9 tribes and individual trust asset and trust fund ac-
10 count holders on matters involving trust asset and
11 trust fund management and reform within the De-
12 partment.

13 “(c) STAFF.—In carrying out this section, the Dep-
14 uty Secretary may hire such staff having expertise in trust
15 asset and trust fund management, financial organization
16 and management, and tribal policy as the Deputy Sec-
17 retary determines is necessary to carry out this section.

18 “(d) EFFECT ON DUTIES OF OTHER OFFICIALS.—

19 “(1) IN GENERAL.—Except as provided in para-
20 graph (2), nothing in this section shall be construed
21 to diminish any responsibility or duty of the Assist-
22 ant Secretary of the Interior for Indian Affairs or
23 the Special Trustee relating to any duty of the As-
24 sistant Secretary or Special Trustee established
25 under this Act or any other provision of law.

1 “(2) TRUST ASSET AND TRUST FUND MANAGE-
2 MENT AND REFORM.—Notwithstanding any other
3 provision of law, the Deputy Secretary shall have
4 overall management and oversight authority on mat-
5 ters of the Department relating to trust asset and
6 trust fund management and reform.

7 “(e) OFFICE OF TRUST REFORM IMPLEMENTATION
8 AND OVERSIGHT.—

9 “(1) ESTABLISHMENT.—There is established
10 within the Office of the Secretary the Office of
11 Trust Reform Implementation and Oversight.

12 “(2) REFORM OFFICE HEAD.—The Reform Of-
13 fice shall be headed by the Deputy Secretary.

14 “(3) DUTIES.—The Reform Office shall—

15 “(A) supervise and direct the day-to-day
16 activities of the Assistant Secretary of the Inter-
17 ior for Indian Affairs, the Special Trustee, the
18 Director of the Bureau of Land Management,
19 and the Director of the Minerals Management
20 Service, to the extent they administer or man-
21 age any Indian trust assets or funds;

22 “(B) administer, in accordance with title
23 II, all trust properties, funds, and other assets
24 held by the United States for the benefit of In-

1 dian tribes and individual members of Indian
2 tribes;

3 “(C) require the development and mainte-
4 nance of an accurate inventory of all trust
5 funds and trust assets;

6 “(D) ensure the prompt posting of revenue
7 derived from a trust fund or trust asset for the
8 benefit of each Indian tribe (or individual mem-
9 ber of each Indian tribe) that owns a beneficial
10 interest in the trust fund or trust asset;

11 “(E) ensure that monthly statements of
12 accounts are provided to all trust fund account
13 holders;

14 “(F) ensure that all trust fund accounts
15 are audited at least annually, and more fre-
16 quently as determined to be necessary by the
17 Deputy Secretary;

18 “(G) ensure that the Assistant Secretary
19 of the Interior for Indian Affairs, the Special
20 Trustee, the Director of the Bureau of Land
21 Management, and the Director of the Minerals
22 Management Service provide to the Secretary
23 current and accurate information relating to the
24 administration and management of trust funds
25 and trust assets;

1 “(H) provide for regular consultation with
2 trust fund account holders on the administra-
3 tion of trust funds and trust assets to ensure,
4 to the maximum extent practicable in accord-
5 ance with applicable law, the greatest return on
6 those funds and assets for the trust fund ac-
7 count holders; and

8 “(I) enter into contracts and compacts
9 under section 102 of the Indian Self-Deter-
10 mination Act (25 U.S.C. 450f) or section 403
11 of the Indian Self Determination and Education
12 Assistance Act (25 U.S.C. 458cc) to provide for
13 the management of trust assets and trust funds
14 by Indian tribes pursuant to a Trust Fund and
15 Trust Asset Management and Monitoring Plan
16 developed under section 202 of this Act.

17 “(f) AUTHORIZATION OF APPROPRIATIONS.—There
18 are authorized to be appropriated such sums as are nec-
19 essary to carry out this section.”.

20 (c) ADVISORY BOARD.—

21 (1) IN GENERAL.—Section 306 of the American
22 Indian Trust Fund Management Reform Act of
23 1994 (25 U.S.C. 4046) is amended to read as fol-
24 lows:

1 **“SEC. 306. ADVISORY BOARD.**

2 “(a) ESTABLISHMENT AND MEMBERSHIP.—Notwith-
3 standing any other provision of law, the Deputy Secretary
4 described in section 307 shall establish an advisory board
5 to provide advice on all matters within the jurisdiction of
6 the Office of Trust Reform. The advisory board shall con-
7 sist of 9 members, appointed by the Deputy Secretary
8 after consultation with Indian tribes and appropriate In-
9 dian organizations, of which—

10 “(1) 5 members shall represent trust fund ac-
11 count holders, including both tribal and Individual
12 Indian Money accounts;

13 “(2) 2 members shall have practical experience
14 in trust fund and financial management;

15 “(3) 1 member shall have practical experience
16 in fiduciary investment management; and

17 “(4) 1 member, from academia, shall have
18 knowledge of general management of large organiza-
19 tions.

20 “(b) TERM.—Each member shall serve a term of 2
21 years.

22 “(c) FACA.—The advisory board shall not be subject
23 to the Federal Advisory Committee Act.”.

24 (2) PREVIOUS ADVISORY BOARD.—The advisory
25 board authorized under section 306 of the American
26 Indian Trust Fund Management Reform Act of

1 1994 (25 U.S.C. 4046) as in effect on the day be-
2 fore the date of enactment of this Act shall termi-
3 nate on the date of enactment of this Act.

4 (d) CONFORMING AMENDMENTS.—

5 (1) Section 302 of the American Indian Trust
6 Fund Management Reform Act of 1994 (25 U.S.C.
7 4042) is amended—

8 (A) in the second sentence of subsection
9 (a), by striking “who shall” and inserting “who,
10 except as provided in subsection (b)(3), shall”;
11 and

12 (B) in subsection (b), by adding at the end
13 the following:

14 “(3) TRUST FUND MANAGEMENT.—The Special
15 Trustee shall report directly to the Deputy Secretary
16 with respect to matters relating to trust fund man-
17 agement and reform.”.

18 (2) Section 303 of the American Indian Trust
19 Fund Management Reform Act of 1994 (25 U.S.C.
20 4043) is amended—

21 (A) by striking subsection (a);
22 (B) in subsection (b)(1), by striking “The
23 Special Trustee” and inserting “Except as pro-
24 vided in section 307(d), the Special Trustee”;

9 SEC. 3. INDIAN PARTICIPATION IN TRUST FUND ACTIVI- 10 TIES.

11 Title II of the American Indian Trust Fund Manage-
12 ment Reform Act of 1994 (25 U.S.C. 4021 et seq.) is
13 amended—

14 (1) by striking sections 202 and 203; and
15 (2) by inserting after section 201 the following:

16 "SEC. 202. PARTICIPATION IN TRUST FUND AND TRUST
17 ASSET MANAGEMENT ACTIVITIES BY INDIAN
18 TRIBES.

19 "(a) PLANNING PROGRAM.—To meet the purposes of
20 this title, a 10-year Indian Trust Fund and Trust Asset
21 Management and Monitoring Plan (in this section referred
22 to as the 'Plan') shall be developed and implemented as
23 follows:

24 “(1) Pursuant to a self-determination contract
25 or compact under section 102 of the Indian Self-De-

1 termination Act (25 U.S.C. 450f) or section 403 of
2 the Indian Self Determination and Education Assist-
3 ance Act (25 U.S.C. 458cc), an Indian tribe may de-
4 velop or implement a Plan. Subject to the provisions
5 of paragraphs (3) and (4), the tribe shall have broad
6 discretion in designing and carrying out the plan-
7 ning process.

8 “(2) To include in a Plan particular trust funds
9 or assets held by multiple individuals, an Indian
10 tribe shall obtain the approval of a majority of the
11 individuals who hold an interest in any such trust
12 funds or assets.

13 “(3) The Plan shall be submitted to the Sec-
14 retary for approval pursuant to the Indian Self-De-
15 termination Act (25 U.S.C. 450f et seq.).

16 “(4) If a tribe chooses not to develop or imple-
17 ment a Plan, the Secretary shall develop or imple-
18 ment, as appropriate, a Plan in close consultation
19 with the affected tribe.

20 “(5) Whether developed directly by the tribe or
21 by the Secretary, the Plan shall—

22 “(A) determine the amount and source of
23 funds held in trust;

24 “(B) identify and prepare an inventory of
25 all trust assets;

1 “(C) identify specific tribal goals and ob-
2 jectives;

3 “(D) establish management objectives for
4 the funds and assets held in trust;

5 “(E) define critical values of the Indian
6 tribe and its members and provide identified
7 management objectives;

8 “(F) identify actions to be taken to reach
9 established objectives;

10 “(G) use existing survey documents, re-
11 ports and other research from Federal agencies,
12 tribal community colleges, and land grant uni-
13 versities; and

14 “(H) be completed within 3 years of the
15 initiation of activity to establish the Plan.

16 “(b) MANAGEMENT AND ADMINISTRATION.—Plans
17 developed and approved under subsection (a) shall govern
18 the management and administration of funds and assets
19 held in trust by the Bureau and the Indian tribal govern-
20 ment.

21 “(c) NO TERMINATION REQUIREMENT.—Indian
22 tribes implementing an approved Plan shall not be re-
23 quired to terminate the trust relationship in order to im-
24 plement such Plan.

1 “(d) PLAN DOES NOT TERMINATE TRUST.—Developing or implementing a Plan shall not be construed or
2 deemed to constitute a termination of the trust status of
3 the assets or funds that are included in, or subject to, the
4 Plan.

6 “(e) LIABILITY.—An Indian tribe managing and administering trust funds and trust assets in a manner that
7 is consistent with a Plan shall not be liable for waste or
8 loss of an asset or funds that are included in such Plan.

10 “(f) INDIAN PARTICIPATION IN MANAGEMENT ACTIVITIES.—

12 “(1) TRIBAL RECOGNITION.—The Secretary
13 shall conduct all management activities of funds and
14 assets held in trust in accordance with goals and ob-
15 jectives set forth in a Plan approved pursuant to
16 and in accordance with all tribal laws and ordi-
17 nances, except in specific instances where such com-
18 pliance would be contrary to the trust responsibility
19 of the United States.

20 “(2) TRIBAL LAWS.—

21 “(A) IN GENERAL.—Unless otherwise pro-
22 hibited by Federal law, the Secretary shall com-
23 ply with tribal law pertaining to the manage-
24 ment of funds and assets held in trust.

25 “(B) DUTIES.—The Secretary shall—

1 “(i) provide assistance in the enforcement
2 of tribal laws described in subparagraph
3 (A);

4 “(ii) provide notice of such tribal laws
5 to persons or entities dealing with tribal
6 funds and assets held in trust; and

7 “(iii) upon the request of an Indian
8 tribe, require appropriate Federal officials
9 to appear in tribal forums.

10 “(3) WAIVER OF REGULATIONS.—In any case
11 in which a regulation or administrative policy of the
12 Department of the Interior conflicts with the objectives
13 of the Plan, or with a tribal law, the Secretary
14 may waive the application of such regulation or administrative
15 policy unless such waiver would constitute a violation of a Federal statute or judicial decision
16 or would conflict with the Secretary’s trust responsibility under Federal law.

19 “(4) SOVEREIGN IMMUNITY.—This section does
20 not constitute a waiver of the sovereign immunity of
21 the United States, nor does it authorize tribal justice
22 systems to review actions of the Secretary.

23 “(5) TRUST RESPONSIBILITY.—Nothing in this
24 section shall be construed to diminish or expand the
25 trust responsibility of the United States toward In-

1 dian funds and assets held in trust, or any legal ob-
2 ligation or remedy resulting from such funds and as-
3 sets.

4 “(g) REPORT.—

5 “(1) IN GENERAL.—Not later than 180 days
6 after the enactment of this section, and annually
7 thereafter, the Secretary shall submit a report to the
8 Committee on Indian Affairs of the Senate and the
9 Committee on Resources of the House of Represent-
10 atives.

11 “(2) CONTENTS.—The report required under
12 paragraph (1) shall detail the following:

13 “(A) The efforts of the Department to im-
14 plement this section.

15 “(B) The nature and extent of consultation
16 between the Department, Tribes, and individual
17 Indians with respect to implementation of this
18 section.

19 “(C) Any recommendations of the Depart-
20 ment for further changes to this Act, accom-
21 panied by a record of consultation with Tribes
22 and individual Indians regarding such rec-
23 ommendations.”.

1 SEC. 4. REGULATIONS.

2 (a) IN GENERAL.—Not later than 1 year after the
3 date of enactment of this Act, the Secretary of the Interior
4 shall promulgate regulations to carry out the amendments
5 made by this Act.

6 (b) ACTIVE PARTICIPATION.—All regulations promul-
7 gated in accordance with subsection (a) shall be developed
8 with the full and active participation of Indian tribes that
9 have trust funds and assets held by the Secretary.

○

The CHAIRMAN. Now, I am pleased to call upon a distinguished member of the committee, the former chairman of the committee, and the principal sponsor of S. 2212, Senator John McCain.

**STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM
ARIZONA**

Senator MCCAIN. I thank you, Mr. Chairman, and Mr. Vice Chairman. I thank you for scheduling today's hearing on S. 2212 that I sponsored with Senators Daschle and Johnson in response to continuing problems plaguing the Department of the Interior's management of Indian trust funds.

Mr. Chairman, since we have been discussing the same issue, I would like to have my complete statement be made a part of the record so that we can move forward with the hearing, except a comment that Senators Daschle and Johnson and I recognize that legislation can and should be modified and it was certainly our intention to be open to proposed changes based on the recommendations of the tribal task force and others.

Some of the recommendations require additional deliberation, but I don't think we should hold back on modifications. It is clear to even the most casual observers that change in the underlying laws is needed and it is needed now.

We have been through countless hearings, GAO investigations, court battles, further delays in the changes we know we can make now will continue the long and sorry history of mismanagement and as has already been mentioned, in recent days the Federal courts are finding it necessary to accept an even larger role in dealing with the consequences of mismanagement by the Department and Congressional inaction.

The bottomline is status quo is unacceptable and I hope we can move forward on this very important issue.

I thank the witnesses for being here today. I thank Mr. McCaleb and the other witnesses and I thank you, Mr. Chairman.

The CHAIRMAN. Your full statement will be made a part of the record, Senator McCain.

[Prepared statement of Senator McCain appears in appendix.]
The CHAIRMAN. I will now call on Senator Johnson.

**STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM
SOUTH DAKOTA**

Senator JOHNSON. Thank you, Mr. Chairman for holding this timely hearing. I want to commend my friend and colleague, Senator McCain as well for the extraordinary leadership that he has exhibited on this chronic and long-standing problem.

I want to acknowledge that on the panel today is Chairman Mike Jandreau of the Lower Brule Sioux Tribe. Mike has served on the Department of the Interior's Trust Fund Reform Task Force. He provided outstanding leadership in a wide range of Native American issues over the years in my State of South Dakota and has brought his talent to bear on this particular issue as well, and I am grateful for that.

Also I notice that in the audience is Phil Hogan. Phil is another South Dakotan. We are proud of his work. He previously was an

U.S. attorney and is now with the Department of the Interior. We appreciate his presence here as well.

I will submit a statement in full so we can get to the panel. I apologize for having been late. Earlier today I had to be at the White House at a bill signing for the Corporate Accountability legislation on which I served on the Conference Committee.

I very shortly need to leave to be on the floor of the Senate, but I will submit a statement in full and simply confirm some of the same views that Senator McCain has expressed, that I think it is important that this legislation be here as a starting point.

It is subject to some modification and we need to continue to keep in mind that if we are going to make progress on this issue it is going to be because we arrive at a resolution through very close consultative process with tribes; that the tribes role in all of this is as an equal, as part of a government-to-government relationship and that there is no resolution possible unless it comes through the tribes themselves as a consequence of their discussions that they have internally.

So, I think this task force is a very important entity. It is my hope that we can at least break this gridlock through the help of this legislation and modifications that will be forthcoming, that we can make some things happen.

I think it was very well said that we act very quickly when there is a crisis on Wall Street, but our actions have not been as expeditious when it has been a long-standing problem that has been of devastating consequences in Indian country.

We need to change that and change that now. This hearing, I hope, will move us in that direction.

Thank you, Mr. Chairman.

The CHAIRMAN. Your full statement will be made part of the record. I thank you.

[Prepared statement of Senator Johnson appears in appendix.]

The CHAIRMAN. Mr. Vice Chairman.

STATEMENT OF HON. BEN NIGHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator CAMPBELL. Thank you, Mr. Chairman.

Well, we have just heard from the four folks on the task force that there is a lot of hard work that remains to be done before we can have a concrete, workable proposal that has the input and the blessing of both the administration and the tribes.

I think all of us on this committee are interested in making sure that we get a bill that we can get signed into law and one that has broad-based support among the tribes, too.

I have said consistently, in fact, that I would oppose any bill that didn't have involvement of the tribes in the drafting of the legislation.

But I would like to commend Senator McCain, Senator Johnson, and Senator Daschle for bringing this bill to us because if nothing else, it has focused the attention on the problem and I think it keeps the administration engaged with the problem.

But I would maybe finally say that I am more interested in doing things right than I am in doing things fast. Whatever time it takes,

we ought to bring this thing to a conclusion. If we can do it this year, fine. I frankly doubt if we are going to be able to do it in just the last few weeks.

But, hopefully, when we do pass something it will be the kind of bill we are all going to be proud of.

Just as a side note, Mr. Chairman, I would like to note that with the single exception of the panel that will be testifying is the Geri Small, who is the first president of the Northern Cheyenne and who is a woman. She has done a fine job up there. She is also the chairman of the Montana-Wyoming tribal leaders association. I am just delighted to see her here. She is a good personal friend.

The CHAIRMAN. She is your boss.

Senator CAMPBELL. She is my boss. In some respects that is correct. Thank you.

The CHAIRMAN. Senator Conrad.

**STATEMENT OF HON. KENT CONRAD, U.S. SENATOR FROM
NORTH DAKOTA**

Senator CONRAD. Mr. Chairman, I just wanted to thank Senator Johnson, Senator McCain, and Senator Daschle for coming forward with legislation. We know that it is a work in progress, that it is open to amendment and discussion. But I do want to thank them for moving the ball forward because it focuses the debate and the discussion and I think there are many useful ideas in this bill.

As I have reviewed the major elements, I think it touches on all those things that most of us share the frustration expressed by Senator McCain and Senator Johnson. You know, this has just been going on and on and on and it never seems to reach a conclusion. Part of that gets before the courts and we all know what happens there.

But it is really time to reach a conclusion on these issues. It is only fair to the Indian peoples whose money is at issue. It is their money. If ever there was a case where we have a circumstances in which it really is the peoples' money, this is it.

They deserve an answer and an accounting of what has happened to their money. So, I want to commend our colleagues for taking the initiative on this is matter.

The CHAIRMAN. Thank you very much.

We have a panel of five witnesses today. First is the assistant secretary of Indian affairs, Neal McCaleb; president of the Northern Cheyenne Tribe and chairperson of the Montana-Wyoming Tribal Leaders Council of Montana, Geraldine Small; the chairman of the Lower Brule Sioux Tribe of South Dakota, Michael Jandreau; the chairman of the Tohono O'odham Nation, Sells, AZ, Edward Manuel, and the executive director of the United South and Eastern Tribes of Nashville, Tennessee, Tim Martin.

I call upon Secretary McCaleb.

**STATEMENT OF NEAL McCALEB, ASSISTANT SECRETARY FOR
INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASH-
INGTON, DC**

Mr. McCaleb. Thank you very much, Mr. Chairman and members of the committee. I am very pleased to have the opportunity to appear before you this morning along with the tribal leaders

arrayed before you at this table who I have been privileged to work with since the first of the year on our tribal task force.

I think that is significant in consideration of the remarks that I am going to make right now. First of all, the administration is unable to support S. 2212 in its current form and recommends, instead, that we look to the recommendations of the Joint Tribal Task Force and the Department of the Interior's efforts toward recommendations in those areas where there is agreement.

While well-intended, and much appreciated, this bill does not reflect the consensus of the opinions that have been reached by the task force over the period of the last 7 months.

I want to express my appreciation to Senators McCain, Johnson and Daschle for the initiative they have shown in filing the bill because at our San Diego meeting in April, we began the discussion of the bill along with 28 other proposals that had been laid on the table for the task force members, a different array of tribal leaders, and Indian organizations.

I pointed out that in Senator McCain's remarks, when he introduced the bill, he stated that the bill was an initiative to focus attention on this issue and that he fully intended to give careful consideration to the recommendations of the task force which was then in progress.

We have had four Tribal Task Force multi-day meetings since April when the bill was first discussed along with the other 28 proposals that were laid on the table. The Tribal Task Force has not endorsed the bill to this date. In fact, it has come up with other recommendations that are in ways in tension with the recommendations of the bill.

For example, the bill recommends the creation of a Deputy Secretary position and after careful discussion of this matter by the Tribal Task Force and the Department of the Interior, we agreed by consensus last week at our meeting in Portland to support the concept of utilizing an Under Secretary. It was after a full discussion of what those two offices meant that that consensus was reached.

As I indicated in my earlier testimony before this committee, we did reach a consensus on the adoption of the model for trust reform which was contained in option 5 of the proposal that was presented on June 4. This had other aspects that were in tension with S. 2212.

We have indicated earlier that we would be happy to provide the committee with draft legislation that embodies the duties upon which the department and the tribal leaders and the task force have agreed upon.

We also object to the creation of the Office of Trust Implementation and Oversight and the proposed 10-year Indian Trust Fund and Asset Management and Monitoring Plans. There is one specific recommendation in section 307(e)(3)(H) which specifically says that the duty of this management reform group is to "ensure the greatest return on those funds and assets."

This is in tension, I think, with the concept of tribal self-determination. I will try to use an example that I have used before. There is no question that in the management of forest assets,

which many of our tribes have, the greatest return on the asset is clear-cutting.

Not one of the tribes that I am aware of that has timber resources have opted to clear-cut. They have all been supporters of selective cutting because of their perception that clear cutting does great damage to the environment and to the wildlife, although it yields the highest return on the investment.

On the one hand, S. 2212 is encouraging tribes to develop a plan under the self-determination option and I do support that idea. That is the reason I am here to try to emphasize and to optimize the opportunity for self-determination and self-governance.

But on the other hand, when you vest in another separate entity the responsibility statutorily to ensure the greatest return on investment, that language is clear and unambiguous, but it is in tension with the aspect of self-governance and self-determination.

My point is that the tribes should decide whether they want to maximize the investment or optimize the investment. There is a substantial difference in those two.

In short, the administration recommends that the committee put aside S. 2212 and consider instead the legislation that reflects the recommendations of the task force. As I have said, these recommendations include the consideration of an Under Secretary position, the creation of a new Office of Self-Governance and Self-Determination that reports directly to that Under Secretary and the creation of a Director for Trust Accountability.

With the permission of the chair, I will ask that my complete written testimony be included in the record and answer any questions when the time is appropriate.

The CHAIRMAN. Without objection, Mr. Secretary, your statement will be made part of the record.

[Prepared statement of Mr. McCaleb appears in appendix.]

The CHAIRMAN. Now, may I recognize President Small?

STATEMENT OF GERALDINE SMALL, PRESIDENT, NORTHERN CHEYENNE TRIBE AND CHAIRPERSON, MONTANA-WYOMING TRIBAL LEADERS COUNCIL, LAME DEER, MT

Ms. SMALL. Thank you. Chairman Inouye, Vice Chairman Campbell, and committee members, thank you for inviting me here today to testify on S. 2212. I am honored to appear before you today to testify on this very important legislation on trust reform.

I am especially proud to be testifying by the Honorable Ben Nighthorse Campbell, the tribe's most esteemed member. Besides serving as president of the Northern Cheyenne Tribe, I also serve as the chair of the Montana-Wyoming Tribal Leaders and as a Delegate to the Trust Reform Task Force.

Today I am speaking to you as the president of the Northern Cheyenne Tribe. I have not had time to consult with the tribes from my region to get a consensus on my testimony.

As you know, S. 2212 was introduced on April 18, 2002 by Senators McCain, Daschle, and Johnson at the urging of the tribes from Great Plains region. I was at a meeting with the Great Plains and Rocky Mountain region tribes on April 17, 2002 when I learned of the legislation.

The Great Plains and Rocky Mountain Tribes discussed the legislation at length that day and worked feverishly to submit a preliminary response generally supporting the legislation. I understand that the introduction of S. 2212 was not popular with the Department of the Interior, some of the Senators sitting on this committee and some tribal leaders.

However, the introduction of legislation was needed to impress upon Interior that legislation is absolutely necessary to resolve trust management problems. I believe that S. 2212 has served that objective effectively and that it has provoked lively discussion concerning trust reform legislation.

According, I thank Senators McCain, Johnson, and Daschle for sponsoring S. 2212.

There are some issues that ascend above party lines and personal agendas. Trust reform is such an issue. It is time to roll up our sleeves and develop administrative and legislative solutions to resolve the long history of mismanagement and Indian trust assets.

With respect to the administrative solution, I have attended every task force meeting and I am impressed by the commitment by the tribal leaders and Interior officials on the task force. I believe the task force is close to creating a new organizational structure that will improve the management of trust assets by the Bureau of Indian Affairs.

Consequently, I believe it is time for this committee to start working closely with the task force to develop trust reform legislation. Tribal leaders have advanced certain things at the task force meetings that I believe must be supported by trust reform legislation. These things are the creation of an independent regulatory commission that will oversee Trust Fund management including the sale and lease of trust resources.

The creation of a new position, either a Deputy Secretary or an Under Secretary that reports directly to the Secretary that will, among other things, coordinate trust reform efforts of all effected agencies; the development of trust standards to guide the BIA in managing trust accounts and resources; the concentration of resources at the local agency level; legislation that addresses the problem of land fractionation; deference to tribal laws regulating trust resources; the continuation of the task force or a task force to work out the details of the implementation of the new organizational structure and trust reform legislation; direct oversight of BLM, BOR and MMS trust management.

Trust reform shall not restrict the tribe's ability to compact. Most importantly, adequate funding.

I will address each of these themes and how S. 2212 deals with them. The creation of an independent regulatory commission that will oversee trust fund management, including the sale and lease of trust management.

I believe that trust principles require that an independent regulatory commission be created to oversee the management of trust funds including the sale and leave of trust resources. Congress needs to create a check and balance to ensure proper trust management.

Tribes and Indian individuals should not have to run to Federal court every time they suspect their accounts have been mis-

managed. Rather an independent regulatory commission should be created to establish trust fund management regulations and to investigate allegations of mismanagement and enforce violations and conduct audits.

S. 2212 creates an Office of Trust Fund Reform Implementation and Oversight that is not independent of Interior nor regulatory in nature. An independent regulatory commission that would oversee and enforce trust management is a better alternative, in my view.

The creation of a new position, either Deputy Secretary or Under Secretary that reports directly to the Secretary that will, among other things, coordinate trust reform efforts of all effected agencies.

S. 2212 creates a Deputy Secretary position that will coordinate trust reform efforts throughout Interior and will report directly to the Secretary. I believe that tribes would prefer a Deputy Secretary as opposed to an Under Secretary, however, Tribes may settle for the Under Secretary as long as the Under Secretary reported directly to the Secretary of the Interior.

S. 2212 is silent on trust standards, however the jurisdiction of the Independent Commission and Trust Officers are limited to trust fund management and the sale and lease of trust resources. The standards for management should be the highest fiduciary standard realized by normal banking standards.

This standard should be confirmed in trust reform legislation. The standard for the management of trust resources is a more difficult question. If the standard is not developed in the trust reform legislation, it should be developed in separate legislation in the near future.

The concentration of resources at the local agency level: S. 2212 does not address this issue and I am not certain how this issue can be addressed legislatively. However, I know that trust funds and resources cannot be managed from afar. Human resources must be available at the local agency level in order to manage trust funds and resources.

Legislation that addresses the problem of land fractionation: S. 2212 does not address the enormous problem of the land fractionation. I understand that the separate legislation is pending concerning land fractionation. It is imperative that the fractionation problems be resolved legislatively in order to make land and resource management more manageable.

Deference to Tribal laws regulating trust resources: S. 2212 does not address this theme directly. However, Rocky Mountain and Great Plains Tribes have identified situations where the implementation of the highest trust standards and trust resources could infringe on tribal regulations.

For instance, the Northern Cheyenne Tribe has set grazing rates on the Northern Cheyenne Reservation. The Great Plains and the Rocky Mountain Region Tribes are concerned that the highest trust standards could require the BIA to obtain the highest price for the resource. This could conflict with the tribe's decision to subsidize tribal cattle operators.

Also, from an enforcement standpoint a trust officer operating under the highest trust standards may remove an operator from a tribal range unit he believes is being over-grazed. The tribe may

not agree with the trust officer's assessment or believe that the trust standard is a lesser standard.

In other words, the tribe would like to reserve these decisions for themselves and avoid interference from the trust officer. Trust reform should not interfere with the tribe's right to regulate trust resources.

The continuation of a task force to work out the details of the implementation of the new organizational structure and trust reform legislation: S. 2212 creates an advisory board to provide advice on all matters within the jurisdiction of the Office of Trust Reform. The purpose of the task force after the proposal is adopted is two-fold. The first reason is to work out the details of the new trust reform organization and regulations for the trust reform legislation. The second would be to work with the independent regulatory commission on trust fund management regulations.

Direct oversight of BLM, BOR, and MMS: S. 2212 provides that the Office of Trust Reform would supervise the Director of BLM and MMS the extent that they administer any Indian trust assets or funds. This is consistent with what tribes would like, except oversight responsibility would rest with the Deputy Secretary or the Under Secretary, whichever position is created, instead of the Office of Trust Reform. Tribes would also like to have BOR included in the oversight to the extent that it administers Indian trust assets.

Trust reform should not restrict a tribe's ability to compact. Self-governance tribes are concerned that the trust reform legislation will negatively impact their compacts with the Federal government. S. 2212 supports a tribe's ability to directly manage trust funds or assets themselves through self-governance laws. Any legislation adopted by Congress should provide the same support.

Adequate funding. Trust reform legislation and the efforts of the task force will prove futile unless Congress commits to adequately funding the BIA. In each task force session, I hear tribal leaders state the resolution of this problem really comes down to adequate funding. I agree with this assessment.

Funding is needed to employ additional quality people, properly train all employees and to purchase the necessary equipment. S. 2212 does not address this issue, as it isn't an appropriations matter.

I raise it today to stress this point. Congress must realize that mismanagement cost Congress money. We would be better off paying what is necessary to manage properly than to pay for the mistakes later.

This concludes my testimony. Thank you for your patience and for allowing me to testify today.

The CHAIRMAN. Thank you very much, President Small.
May I now call upon Chairman Jandreau.

**STATEMENT OF MICHAEL JANDREAU, CHAIRMAN, LOWER
BRULE SIOUX TRIBE, LOWER BRULE, SD**

Mr. JANDREAU. Hello. Chairman Inouye, Senator Campbell, Senator McCain, it is my honor to address you today. It is my hope that my testimony will be made a part of the record.

The CHAIRMAN. Without objection, it is so ordered.

Mr. JANDREAU. I would like to informally address those parts of my testimony that I wish to accent.

I have been involved in tribal government for 30 years now, directly, as either a councilman or the chairman. For 23 of those years I have been a chairman of my tribe. I was on the first task force that was developed under President Bush, Senior. I served on there approximately 1½ years.

I have had the opportunity to be appointed by my peers to serve on this task force. This time I am the only one from Sioux country. I am also chairman of the United Sioux Tribes. The Sioux feel that a Deputy Secretary is essential to elevate the position of Indian Affairs to a level that is commensurate with their standing as citizens of the United States and as individual tribal groups who have given much for the development of this country.

We also feel that there should be Deputy Secretary of the Interior that would handle the trust assets and the Indian programs. There are many other issues in relationship to the total development of S. 2212 that we need to occur.

But unless it is enacted into law, unless it becomes something that we as tribes can build on, we really have nothing but good faith.

I have attended every task force meeting, however, I missed the one important one. As you know, I listened to the testimony this morning and I was amazed because it seems like in Portland when I wasn't there everything worked out. So, I got to feeling a little guilty. Maybe I am a part of the impediment. I don't really feel that way.

But there are many issues regarding 2212 that we have dealt with in conversations in the Indian Caucus task force. One of the matters was that in Bismarck we agreed to ask for hearings. The tribal member portion of the task force caucus all agreed to it. But when we went into joint session, there seemed to be a huge confusion that pervaded the room.

Finally, we did get a letter from the chairman or one of the co-chairs sent to Congress saying that we did wish hearings. We were told by the administration that we were jointly going to have testimony prepared that would adequately reflect both the administration and the tribal consultees' position.

You know, the ironic part is this last week or so there was language attached to an appropriation bill in the House that talked about some very interesting things in which none of the administration knew anything about.

I find it very difficult, after all the years that I have been involved, to say that we can really consistently develop something that has a true tribal complexion, that has a true tribal ideal that is not meant for and somehow ameliorating what the administration wants.

I believe in self-determination. I work very hard on my own reservation to make self-determination a reality. I find it doesn't matter whether you are a Democratic or a Republican. But if you are an Indian, your rights just seem to mean a little less.

Thank you.

[Prepared statement of Mr. Jandreau appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Chairman.

Now I will call on Chairman Manuel

**STATEMENT OF EDWARD MANUEL, CHAIRMAN, TOHONO
O'ODHAM NATION, SELLS, AZ**

Mr. MANUEL. Chairman Inouye, Vice Chairman Campbell, my name is Edward D. Manuel. I am chairman of the Tohono O'odham Nation which is located in south central Arizona. It consists of 25,000 members and a land base of 2.8 million acres.

I am also a Western Region Tribal Representative serving on the Tribal Leader/Department of the Interior Trust Reform Task Force.

I am honored to be here and I thank you for the invitation and I appreciate the opportunity to testify before the committee on S. 2212. I will summarize my testimony, if I may, and submit it for the record.

The CHAIRMAN. Without objection, your full statement will be made part of the record.

Mr. MANUEL. The first point I want to make on S. 2212 is that it provides the incentive for the administration and the tribes to stay engaged to bring about a much needed trust reform. Reform of the Federal Government to meet its duty of trust responsibility to American Indian tribes is a complicated and difficult task. Previous efforts of reform have fallen victim to one or a combination of political, financial, legal or intellectual factors.

Everyone including Congress, the Executive, the Judiciary, the tribes and individual beneficiaries recognize the need for change. However, what that change should entail at times creates disagreement among the parties involved.

One point is certain. S. 2212, along with other Congressional interest shown in trust reform, has provided the incentive to keep the Bush administration engaged with the tribes on reform discussions. To this end, the active participation of this committee and the Congress, whether during this legislative session or the next, is crucial.

Continued Congressional participation is critical not only with development of the trust reform plan, but in the successful implementation of a plan as well. This committee is encouraged to keep trust reform at the top of its agenda during the next Congressional session.

S. 2212 serves as a basis to start the discussion of trust reform and provides a foundation to keep the discourse continuing.

The second point I want to make is that S. 2212 encompasses many worthwhile ideas needed for legislation. As written, the American Indian Trust Fund Management Act of 1994 may have been successful in the implementation of trust reform. The act contains many wonderful phrases and requirements.

Those requirements, amongst other things, are all elements which the tribe wants to see implemented in the current reform effort. The question is: What went wrong with the 1994 reform act?

The tribes maintain that the lack of success of the 1994 Reform Act was that the inability of the Special Trustee to act independently of the actions of the Department of the Interior. Thus, difficult changes, crucial for reform, were never identified, or if identified, never implemented.

While tribal leaders had input in the drafting of the 1994 reform act, the original intent was to place the Office of Special Trustee outside of the control of the Secretary of the Interior. The tribe wanted an independent external office with authority to address the trust issue. This particular element of the 1994 Reform Act was compromised politically and trust reform was not successful as a result.

S. 2212 needs a provision that would create an independent, external enforcement and oversight body to ensure the Department of the Interior's proper performance of the Federal Government's fiduciary or trust responsibility to the American Indian tribes are carried out.

The tribal leaders of the Trust Reform Task Force believe an independent body is absolutely necessary for successful trust reform to occur. Should S. 2212 prove to be the vehicle for trust reform, the bill should be amended to provide for this independent body.

Another crucial problem of the 1994 Reform Act was the fact that tribes, especially those who had the capability of managing their own trust assets, funds and resources, were forced to comply with national "one-size-fits-all" standards. No adjustments were allowed to account for the local variations most tribes encounter when meeting the needs of local constituents.

Many tribes ended up politically opposing the reforms suggested by the Special Trustee due to this lack of consideration for local concerns.

S. 2212 helps face this issue by allowing each tribe the ability to create an "Indian Trust Fund and Trust Asset Management and Monitoring Plan." The plans, once approved, will take local needs into account by providing for the management and administration of funds and assets held in trust by the Bureau and the tribes.

Furthermore, S. 2212 requires the Secretary to comply with tribal law in relation to the management of trust funds and assets unless prohibited by Federal law. This is tribal self-determination at the most fundamental level. Such provisions are critical to the success of any trust reform and must be included in any legislation passed to address the situation.

My third point is that an independent oversight commission is legally plausible. There was a lot of discussion this morning regarding the independent oversight commission. We had looked at the separation of powers of the three branches. We looked at the court's past decisions. We looked at the unique trust relationship, and guardianship principles. We looked at the plenary powers doctrine and we believe that it would stand judicial scrutiny in the creation of this independent body.

My fourth point is that the union and Civil Service protections must not present obstacles to reform. During our discussions in the Tribal Leaders/Department of the Interior Joint Task Force, there were many issues brought out regarding Bureau employees who hamper local tribal government self-determination initiative.

We request that in the legislation dealing with trust reform, the issue of Civil Service protection and incompetent employees should be scrutinized to be sure that tribes and their members are being

provided trust services by individuals who will be held accountable for their actions.

Further, this Civil Service protection should not be the foundation for career oriented but non-dedicated employees to derail trust reform. Employees need to have access to training and experience to properly carryout their trust function. But once that training and instruction is provided and employees make the conscious choice not to perform properly or simply cannot perform properly, then these employees should be relieved of their employment and not be able to hide behind Civil Service law or even union agreements to protect such employment.

Tribes must continue to be involved with the implementation of reform. Over the years, tribal leaders have participated in many efforts to reorganize or reform the Federal Government's provision of services to Indian country. Many of these plans produced positive and concrete ideas which, if implemented, would have resulted in greatly improved services. However, none of these plans were totally implemented.

Tribal leaders must continue to have a voice in the trust reform efforts in order to compel implementation of the plan, thereby ensuring the successful reform of the Bureau of Indian Affairs.

While S. 2212 calls for the creation of an Advisory Board, the constituency of which will contain tribal people, the Board will simply not have the authority to mandate implementation of any particular aspect of reform should such be necessary. The same now holds true for the Advisory Board created in the 1994 Reform Act. Complete change did not occur under the 1994 Trust Reform Act because the Board did not have the proper authority to make change happen.

The tribal leaders on the current Trust Reform Task force are advocating for the creation of an independent oversight commission having the authority to ensure the Federal government's trust functions and fiduciary responsibilities are properly performed.

This oversight mechanism will only become effective if trust reform legislation is fully implemented. Tribes, as a whole, must continue to be engaged, through the Task Force or another body, to ensure that the entire reform plan, which includes an independent oversight commission, is completely implemented. Only thereafter can the independent oversight commission take control and provide the continuous tribal input needed for the successful provision of trust services.

In conclusion, the Tribal Leader/DOE Trust Reform Task Force continues to develop the crucial elements needed to bring about reform of the Federal Government's trust services to Indian country.

Eventually, legislation will be needed to implement this reform. The task force envisions that the position of Under Secretary be created. This position will be the focal point and responsible for the Federal Government's trust obligation. This person will have line authority over all Department of the Interior trust functions. This is similar to, but not identical with what is contemplated in S. 2212.

The task force believes that all, not some, of the agencies within the Department of Interior should be subject to the Under Secretary's control in relation to trust responsibilities for Indians.

Furthermore, the tribal leaders on the task force insist upon the creation of an independent oversight commission. S. 2212 does not contain this element. If S. 2212 is the vehicle to be used for trust reform, the task force requests that the concept of an independent oversight commission as developed by the task force, be placed in such legislation.

Thank you for the opportunity to provide testimony here today on this very important topic. I will be happy to answer any questions from the committee.

The CHAIRMAN. I thank you very much, Mr. Chairman.

May I now recognize Mr. Martin.

**STATEMENT OF JAMES T. MARTIN, EXECUTIVE DIRECTOR,
UNITED SOUTH AND EASTERN TRIBES, NASHVILLE, TN**

Mr. MARTIN. Chairman Inouye, Vice Chairman Campbell, Senate Committee on Indian Affairs: I have submitted a written testimony and I would like that to be made part of the record.

The CHAIRMAN. Without objection it is so ordered.

Mr. MARTIN. I would like to further comment on that testimony and highlight some of the key components of that testimony and some of the discussion that has already occurred today and reflect on hopefully some of the discussion that should occur in the future.

I am here today before you, James Martin, enrolled member of the Poarch Band of Creek Indians. I serve as executive director of United South and Eastern Tribes. As executive director, I was appointed by the 24 member tribes of our region to represent them on the tribal task force on trust reform.

Going to the task force meeting and working within that task force, I was appointed by that task force along with Ross Swimmer, to cochair a subcommittee of that task force on EDS As-Is Business Process Modeling.

On behalf of our 24 member tribes, I would like to express our appreciation to be able to come and to express our views on Indian trust management reform. I would also like to express my appreciation to the task force, both the tribal and Federal members of that task force, for the work that has been done to date to bring about a structure that protects the Government's fiduciary responsibility to tribes and promotes accountability at all levels of the Department of the Interior and the Bureau of Indian Affairs.

I would like to thank Senators McCain, Daschle, and Johnson for introducing S. 2212 as a mechanism to assist the task force in this monumental task. This group, this panel, that is before you today are here walking a tightrope.

I want to be able to honor my commitment to the task force and honor the consensus that have been made in those deliberations, but at the same time, be able to comment from our tribe's perspective on S. 2212.

There are some differences and there are some similarities. I would like to be able to highlight some of those. Before I do that, though, I would like to talk about our region and our perspective in our region.

The USET tribes vary differently. We have very wide differences in population, the governmental infrastructures, economic develop-

ment. And the endowments of natural resources vary widely. However, we are deeply committed to self-determination.

We are committed to exercise our right to sovereignty through the self-determination by 638 contract. In our region over 95 percent of the resources that go into our region is contracted out either by 638 contracting or by compact.

By and large, the only services rendered by the Bureau of Indian Affairs at the regional level are the inherent Federal functions. So, all of the functions that we are talking about are being performed by the tribes. That is a testament to our commitment to self-determination.

Our tribes have engaged frequently in conversations regarding trust resource management, trust asset management, and this reform effort, ever since the Secretary introduced it last November.

Our tribes first expressed our recommendations to the Secretary on February 1, when USET proposed an alternative to BITAM. I also testified before this committee on February 26, where I outlined our proposal.

Earlier this month, July 8, our tribes came together again in consultation to deliberate over the task force's recommendations at that time, the different 29 proposals that had been dwindled down to four different options. Our tribes deliberated over those options. We looked at our proposal and we made adjustments to our proposal.

But our tribes unanimously and unequivocally asserted that regardless of whatever structure is finally settled upon, that a single point of decisionmaking authority still has to occur at the local level for all Indian programs. And I want to reiterate that point and emphasize that point from the outside because the tribes of our region believe that it is getting missed, that it should not be overlooked any longer.

Our tribes have the day-to-day experiences showing that trust management systems are working. When it comes to affective delivery of Indian trust services and the proper execution of the fiduciary trust responsibilities, the current bureau structure that unites both the trust accounting and trust services personnel at the region and tribe agency level that assures tribes have direct access and interaction with decision makers responsible for the programs.

Based upon our experience in our region, this access is essential whether those Federal responsibilities are administered pursuant to self-determination contracts or compacts or delivered directly by the Bureau of Indian Affairs.

This structure provides a bottom-up accountability that is as important to the trust beneficiaries as the structure of the single executive is to the Department of the Interior. This point has been identified and articulated by our tribes from day one as we learned about the Secretary's BITAM proposal.

At the local level we need to improve accountability and eliminate inefficiencies. This can be done by the improvement of trust standards, trust policies and trust procedures. A key problem is excessive delay in working through the various levels of the bureaucracy.

But to the extent tribes had administered 638 programs through contracts and provided that the regional office is set up to offer

tribes one-stop shopping to contract those programs, the system works.

Department of the Interior representatives on the task force continue to demand additional layers of bureaucracy that duplicate authority at the local level. Such a structure would impede tribes' efforts by adding excessive, ineffective and costly administrative procedures to a system that is overly bureaucratized to date.

In order to maintain and expand tribal involvement and to enhance opportunities for tribes and include individuals to exercise bottom-up accountability, the Federal government needs to streamline the trust asset management, not bureaucratize it.

Now to the key elements to which I believe the task force and S. 2212 do agree on. The task force has reached consensus on the senior executive leadership structure, consistent with what was proposed in S. 2212. Both the task force and S. 2212 elevate the senior executive within the Department of Interior.

The senior trust executive reports directly to the Secretary and has direct line authority over the assistant secretary of Indian affairs and over the assistant secretaries of each of the bureaus that perform functions and/or administered trust assets. This line authority would serve to protect the full range of trust funds and assets managed by the Federal Government and institute the call for a single executive to ensure that the trust obligations are met.

The task force has selected the concept of an Under Secretary rather than a Deputy Secretary based on the view that establishing an Under Secretary would run into political objections that might arise with proposing what appears to be an unprecedented second Deputy Secretary within the Executive Department.

Now, to ensure that trust policy is properly implemented at the regional and agency level, USET has suggested that five commissioner positions be established as Civil Service posts under the Assistant Secretary for Indian Affairs. These five commissioners would have the responsibility to ensure the proper execution of trust responsibilities at the regional and tribe agency level.

The Commissioner for Indian Services and the Commissioner for Trust Management would have quality assurance and oversight authority with respect to the trust functions pertaining to the regional director.

This authority over trust functions at the central office to regional office level would parallel the Under Secretary's authority over trust functions pertaining to the Assistant Secretary in the other Department of Interior bureaus. Meanwhile, the line of authority over the operational responsibilities of the regional director would run from the Assistant Secretary to the Commissioner of Regional Operations.

All 12 regional directors would answer directly to the Commissioner from Regional Operations. For reasons I have mentioned above, the Eastern Region Tribes urge that all trust services and resources remain at the regional level under the direction of a single line of authority.

Below the regional directors is where the performance and authority over trust services and trust resources would divide. For example, through a deputy regional director for trust services and another for trust resource management, the agency supervisory level

would replicate the same structure, one single line of authority, the agency superintendent, with authority over all trust services and trust resources at the agency level.

You separate the functions. You separate the personnel. But there is nothing to date to indicate that those separated personnel cannot still report in to a single line of authority when you have clearly delineated out the policies, the procedures and the standards that those two sets of personnel have to adhere to.

A key point is to have one individual decision maker at the level of the bureaucracy to whom the tribes have access to agree on. Another component that both the task force and S. 2212 involves corresponding elevation of the policy of Indian self-determination.

Both the task force and S. 2212 proposals place responsibility to self-determination contracting and compacting within the domain of the senior trust executive.

While S. 2212 authorizes the deputy secretary to enter into self-determination contracts, the task force proposes the establishment of an Office of Self-Determination Policy in the Office of Under Secretary.

At the strong request of tribal representatives, the task force agreed that while policy formulation regarding self-determination shall be elevation to the under secretary level, the implementation of self-determination agreements must remain at the level most appropriate to ensure the tribe's greatest access.

Independent oversight: Both S. 2212 and the Trust Reform Task Force coincide in the view that establishing accountability for the Department of the Interior trust management requires independent oversight. However, the task force has not reached a consensus regarding the scope and powers to be delegated to this independent commission.

Both the tribal and Federal representative agree that the commission should have powers to audit trust accounts, investigate allegations of accounting failures, and agency action inconsistent with the trust responsibilities, and analyze budget needs.

There also appears to be, however, general agreement that the oversight commission would perform quality assurance and accountability through the under secretary and on down the chain of command. Quality assurance is understood to be trust management oversight functions, not administration and implementation.

One of the failures that our tribes see in the functions to date is that the people and offices that were put into place to oversee the dealings of trust management actually got involved in performing them. To me, that is a fundamental flaw of all of the transactions and the reorganizations that have appeared to date.

The main disagreement on the commission is to tribal and Federal representatives disagree to the nature of the commission's enforcement authority and regarding the delegation of rulemaking authority.

I have agreed to cochair a task force sub-work group to seek resolution to these differences. To sum up these differences, the Federal representatives have suggested that the commission should exercise its enforcement authority by referring findings of non-compliance to the Treasury Comptroller of the Currency for it to determine what sanctions and/or remedies to apply.

The tribes wish to empower the commission with the range of enforcement mechanisms available to the Comptroller, so as to retain full discretion and authority to independently take actions and bring about corrective actions on whatever issue is at hand.

As regards to rulemaking, the tribes want the commission to be able to promulgate rules. The Federal representatives have objected to having a commission take the rulemaking outside of the Secretary's own discretion of rulemaking.

Let me also note that S. 2212 retains and rebuilds the Office of Special Trustee [OST]. The view of the tribes in the eastern region is that the commission would assume most of the functions now changed to OST.

We believe legislation will be required to provide for a transition of functions from the Special Trustee to the independent commission.

Establishing clear trust standards: In testimony before this committee last month, the Deputy Secretary of the Department of the Interior stated that he was not able to define the standards governing Indian trust responsibility. The tribal members of the task force and the Eastern Region Tribes urge this committee and Congress that it is time for Congress to establish statutory standards governing the trust responsibilities.

If the senior officials from the Department of the Interior responsible for overseeing the trust responsibility is not able to articulate the standard, then the Department of the Interior is not well positioned to execute that responsibility.

Our tribes believe a starting point for legislating this definition can be found in the Department of the Interior's own policy manual which provides under part 303, section 2.7, it delineates out the secretary's responsibility.

I will not go into that. That is in my written testimony. It has already been articulated. It had also captured in the secretarial order, talking about trust principles. I would refer the committee to both the manual and the secretarial order.

The tribal representatives on the task force believe that the secretary's accountability for trust responsibility would markedly improve if legislation modeled on these guidances in the departmental manual were enacted into law to provide a basic definition for trust responsibility and the secretary's corresponding duties to carryout that responsibility.

Under standards, the tribes and the Secretary have disagreed on different views about standards and how far that these standards should go.

The tribes have discussed the possibility of permitting the development of standards governing tribal implementation of trust duties. The idea that tribal standards might be different from the Secretary's does not imply that the standards would be lower. Rather, the separate standards simply knowledge that different policy considerations are at play. For instance, rather than a standard requiring that the resources be leased for their highest market value, a tribal standard may be to assure the resource's protection and preservation in order to fully reflect the asset's cultural and spiritual value.

From the perspective of USET tribes, the proper execution of the trust responsibility is achieving a balance that maximizes the utilization of trust resources and protects those trust resources for future generations.

No structure can work without sufficient resources to drive it. Lack of funding and personnel, particularly at the regional level, account for a significant portion of the Secretary's failure to properly discharge the Federal Government's trust duties.

We ask this committee, in reviewing the Task Force's proposal, to bear in mind that new structures and functions will be replacing the existing offices within the Department of the Interior. The President has proposed significant budget increases for trust reform. We believe they should be targeted to the trust reform efforts currently being proposed by the Task Force.

In closing, I would like to reflect and express our tribe's sincere appreciate for the Department of the Interior, Deputy Secretary Griles, Assistant Secretary McCaleb, and their staffs for engaging in an unprecedented historic level of consultation on this issue.

Have we had problems? As Senator Inouye said, "Is it a lovefest?" No, it is not. These last meetings have been hard. They have been gut wrenching. I believe, though, I can say with sincerity that both parties are sincere in trying to accomplish something and we stand on the brink of an opportunity for that to come out.

I would sincerely ask this committee to continue to engage your staff in coming to the meetings and offering solutions to these problems as we engage them.

I would invite, and I hope you have reserved all the good questions for us.

The CHAIRMAN. I thank you very much, Mr. Martin.

[Prepared statement of Mr. Martin appears in appendix.]

The CHAIRMAN. The Task Force was established in January this year. Since its establishment, seven formal meetings have been held. The eighth will be in Anchorage, AK in late August.

Between these formal meetings numerous caucuses and conference calls, and subcommittees of the task force have met. Many hours have been expended. I gather that all of you are members of the Task Force. Am I not correct?

The general tone of the testimony I have heard among the Indian witnesses is that you approve of the process and procedure adopted by the Task Force in carrying out its mission to resolve these long standing issues; am I correct?

Mr. MARTIN. Chairman Inouye, I think you are correct in those things. I think I can say to you on behalf of the other people here that we are in agreement on the recommendations that have been made thus far from the tribal and Department of the Interior Task Force.

The outstanding issues, as in any give and take and deliberations of parties coming from different viewpoints, even though they are few in number, we are still in monumental disagreements on some of the issues. But I believe that we have the mindset, we have the people at the table, that we can come back to this committee with some concrete recommendations on the outstanding issues.

Is it going to solve all of the problems? Is everybody going to be 100 percent unanimous for it? No, sir. I don't believe that was ever

envisioned by anybody who sat down at those tables when we began.

The CHAIRMAN. I gather that this Task Force is an historic one in the sense that there has been more consultation and joint work than any other task force in the history of Indian relationship with the Government of the United States.

This, but this committee has held more meetings than any other committee in the Congress of the United States. In the 21 weeks of legislative work, we have already held 48 meetings, including this one. We have held five on the work of the Task Force. We look forward to the next one.

I can assure you that we are intent on bringing forth the statute that will incorporate your recommendations. So, we are serious in our work.

We have two measures before us, S. 2212 and the work of the Task Force. But I gather that if the Task Force carries out its mission, all of you will be satisfied.

I thank you all very much.

Mr. MARTIN. You would be welcomed, Senator.

The CHAIRMAN. The hearing is adjourned.

[Whereupon, at 12:47 p.m. the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. TOM DASCHLE, U.S. SENATOR FROM SOUTH DAKOTA

Chairman Inouye, Vice Chairman Campbell and members of the committee, thank you for holding this hearing on S. 2212, the Indian Trust Asset and Trust Fund Management Reform Act of 2002. Trust reform is a critical issue for the Native American community nationwide, and I am pleased to have joined with Senators John McCain and Tim Johnson in sponsoring this legislation.

Indian country has faced many challenges over the years. Few, however, have been more important, or more difficult, than ending the mismanagement of the Indian trust fund and restoring integrity to this administrative process. The Indian Trust Asset and Trust Fund Management Reform Act is intended to focus attention on solutions to the longstanding problem of inefficient management of the assets and funds held by the United States in trust for federally recognized Indian tribes and individual American Indians.

For over 100 years, the Department of the Interior has been charged with the responsibility of managing a trust fund containing the proceeds of leasing of oil, gas, land and mineral rights for the benefit of Indian people. Today, that trust fund may owe as much as \$10 billion to as many as 500,000 Indians.

To give some perspective, the 16 tribes of the Great Plains in South Dakota, North Dakota, and Nebraska comprise 10 million acres of trust lands representing over one-third of the trust accounts. Many enrolled members of the nine South Dakota tribes have trust accounts.

How these trust funds have been, and will be managed is being litigated in *Cobell v. Norton*, and the resolution of this lawsuit will have far-reaching ramifications throughout Indian country. It is impossible not to evaluate potential legislative responses in the context of this lawsuit.

There is clear consensus in Indian country that the current administration of the trust fund is a failure. The vexing question has always been how to reform it.

Last fall, the Secretary of the Interior unveiled plans to reorganize the Bureau of Indian Affairs [BIA] and segregate the oversight and accounting of trust-related assets in a new Bureau of Indian Trust Asset Management [BITAM]. In testimony before the U.S. District Court, she acknowledged that, "We undoubtedly do have some missing data—and we are all going to have to find a way to deal with the fact that some information no longer exists."

The Secretary's controversial reorganization proposal was presented to the court with minimal consultation with the tribes or individual Indian account holders, not to mention Congress. In South Dakota, tribal leaders communicated to Tim Johnson and me their concern that the Secretary's solution appeared to be a fait accompli, conceived without meaningful participation of the stakeholders most directly affected by it. They felt strongly that this proposal should not be implemented without further consultation with the tribes.

Earlier this year, in the face of Administration assurances that its reorganization plan was not set in stone, the Interior Department requested that \$200 million from the BIA and \$100 million from the Office of the Special Trustee, be reprogrammed

to "a single organization that will report to the Secretary through an Assistant Secretary, Indian Trust." This contradiction set off red flags in Congress, and a clear and direct message was sent to Secretary Norton by Senators Inouye, Campbell, Byrd, Johnson, and others that no action should be taken to implement her proposed reorganization plan administratively.

Given these developments, Senators McCain, Johnson, and I felt that Congress should be more assertive in forcing discussion of what role Congress might play in ensuring that tribes and individual Indian account holders have a voice in shaping trust reform policy. It is our hope that this bill will stimulate better dialog among the Congress, the Department of the Interior, and Indian country on this problem.

With that goal in mind, the Indian Trust Asset and Trust Fund Management Reform Act was reviewed by representatives of the Great Plains tribes at a meeting in Rapid City in April. Mike Jandreau, chairman of the Lower Brule Sioux Tribe, has been an effective advocate and champion of trust reform, not only for his tribe, but for all Indian people. Mike and Tom Ranfranz, chairman of the Flandreau-Santee Sioux Tribe and president of the Great Plains Tribal Chairmen's Association, led a very productive working session with tribal leaders from South Dakota, North Dakota, Nebraska, Montana, and Wyoming that both raised awareness of the stakes of this issue and built support for the McCain/Johnson bill.

I commend the willingness of tribal leaders to be a part of a public process that will hopefully will not stop until Indian country feels comfortable with a final trust reform product. The McCain-Johnson-Daschle bill is intended to be a starting point for promoting greater understanding of what needs to occur to achieve meaningful trust reform and for focusing attention on concrete solutions to the problem.

At this point, I would like to share with my colleagues some initial observations on this proposal that were raised by participating South Dakota treaty tribes and tribes of the Great Plains and Rocky Mountain regions. These comments demonstrate how thoughtfully Indian leaders are approaching the trust problem, and I encourage the committee to consider their suggestions as it addresses the trust reform challenge.

The following issues are of great importance to the Great Plains Tribal Chairman's Association:

Providing the Deputy Secretary with sufficient authority to ensure that reform of the administration of trust assets is permanent; They do not believe the bill at present gives the Deputy Secretary the full and unified authority needed;

Including cultural resources as a trust asset for management purposes;

Incorporating the Office of Surface Mining and Bureau of Reclamation and other related agencies within the Department of the Interior and the Federal Government under the purview of the Deputy Secretary;

Assuring that the legislation not infringe on tribal sovereignty by interfering with tribal involvement in the management of individual trust assets or tribal assets, or both;

Maintaining the Bureau of Indian Affairs's role as an advocate for tribe;

Providing in law that Bureau of Indian Affairs funds not be used to fund the Deputy Secretary appointed by the legislation;

Stressing the importance of appropriating adequate funding allow reform to succeed;

Reflecting in the legislative history that much of the funding needed for real trust reform be allocated at the local agency and regional levels of the Bureau of Indian Affairs;

Since bill introduction in April, revelations of corporate mismanagement and its consequences for the pensions of individual American workers have sent shockwaves through the country. Lawmakers, economists and academics, appalled by the Enron and MCI/WorldCom experiences, have called for swift and decisive action to strengthen corporate accounting practices and protect employee pension accounts. And Congress has responded. Earlier today, in the East Room of the White House, with great fanfare surrounded by congressional leaders, President Bush signed corporate accountability legislation.

Unknown to many of these lawmakers, economists and academics, a similar injustice is occurring out of the public spotlight to many American Indians. And the responsible party is not corporate management, but rather the Federal Government.

The issues of trust reform and reorganization within the BIA are nothing new to members of the committee, or to Indian country. Collectively, we have endured many efforts—some well intentioned and some clearly not—to fix, reform, adjust, improve, streamline, downsize, and even terminate the Bureau of Indian Affairs and its trust activities.

These efforts have been pursued in both Republican and Democratic administrations. Unfortunately, they have rarely sought meaningful involvement from tribal leadership, or recognized the Federal Government's treaty obligation to tribes.

Both meaningful consultation and acceptance of tribal status are essential if we expect to find a workable solution to the very real problem of trust management. The bill Senators McCain, Johnson, and I have introduced reflects this conviction.

There is no more important challenge facing the tribes and their representatives in Congress than that of restoring accountability and efficiency to trust management. And nowhere do the bedrock principles of self-determination and tribal sovereignty come more into play than in the management and distribution of trust funds and assets.

This measure recognizes that the only effective long-term solution to the trust problem must be based on government-to-government dialog. I am hopeful the discussion the Indian Trust Asset and Trust Fund Management Reform Act generates today will not only provide the catalyst for meaningful tribal involvement in the search for solutions, but also form the basis for true trust reform. I look forward to participating with tribal leaders in pursuit of this important objective.

Thank you.

PREPARED STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM SOUTH DAKOTA

Chairman, Inouye, Vice Chairman Campbell, and members of the committee, thank you for holding this hearing. Also, thank you, Chairman Inouye, for your leadership on this issue. First, I'd like to welcome all the tribal leaders who have traveled to Washington, DC to address this committee on these important issues of trust reform. I'd like to especially thank Chairman Jandreau of the Lower Brule Sioux Tribe for giving his insights into this critical issue. Chairman Jandreau is from my home State of South Dakota and has served the Department of the Interior's Trust Fund Reform Task Force. Mike is the longest serving tribal chairman in South Dakota. As always, Mike has risen to the occasion and offered outstanding leadership, this time on the issue of trust reform.

I apologize for missing today's earlier hearing pertaining to the Tribal/Interior Trust Fund Task Force's findings. I was unable to listen to the testimony in person because as a senior member of the banking committee and chairman of the financial institutions sub-committee, I was pleased to serve on the accounting reform and corporate responsibility conference committee. The President signed that legislation into law today and I attended that signing. I find it ironic, that fixing private sector corporate mismanagement was viewed with such urgency, yet fixing public sector mismanagement of funds has yet to be done.

As I've said again and again, the issue of trust fund mismanagement is one of the most urgent problems we are faced with in Indian country. It is also one of the most complex and difficult. But the time to act is now. This has gone on for far too long. I hope that the Trust Fund Task Force will soon put forth recommendations that the Congress can take to heart, review, and act on. I look forward to reading the testimony and the report issued by the Task Force and listening to the testimony of the witnesses here today.

I've indicated previously that S. 2212 can be the vehicle for implementing needed change. 1, along with my distinguished colleagues Senator Daschle and Senator McCain, want this bill to be the starting point. I look forward to working with other members of this committee, the Department of the Interior, and the tribal leaders in reaching an appropriate solution to this critical problem. I feel strongly that we need to work at getting some resolution by the end of this Congress. I hope today's hearing on S. 2212 and the testimony of our witnesses will play a role in passing these important reforms. Thank you again for holding this hearing today.

PREPARED STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA

Mr. Chairman and Vice Chairman, I thank you for scheduling today's hearing on S. 2212, legislation I sponsored along with Senators Daschle and Johnson, in response to continuing problems plaguing the Interior Department's management of Indian trust funds. I would also like to thank the witnesses for appearing today and for their commitment to work toward a meaningful legislative reform proposal.

As I stated upon introduction of this bill in April, the purpose of this legislation is to serve as a "place-holder" bill that can be modified or expanded as the dialog to consider reform alternatives ensued between the Interior Department, the Tribal Task Force and the Congress. I, as well as Senators Daschle and Johnson, thought it critically important to voice the concerns of the Congress in this process and to

stand ready with a legislative remedy. I don't think there can be any doubt that a legislative remedy is required.

S. 2212 focuses on two primary changes to the 1994 American Indian Trust Fund Management Reform Act, the underlying law governing Indian trust funds management. First, it creates a single line-of-authority in the Interior Department by establishing a Deputy Secretary for Trust Management and Reform; and second, the bill strengthens provisions for Indian tribes and beneficiaries to directly manage or co-manage with the Interior Secretary trust funds and assets, based on successful self-determination policies.

Obviously, this legislation does not address every issue or problem inherent in trust funds or trust assets management, but it deals with two of the primary issues that are important to true reform—a single, high-level policy official responsible for oversight of trust funds and assets management and, authorizing the Secretary to contract with Indian tribes to directly manage trust funds or assets themselves through self-governance laws—concepts embraced by tribes, the Congress and eight presidents of both parties for more than three decades.

I, along with Senators Daschle and Johnson, recognize that S. 2212 as currently drafted, can and should be modified—it was certainly our intention to be open to proposed changes based on the recommendations of the Tribal Task Force and others. As the discussions between the Task Force and the Department have matured, it has become clear that this legislation responds in a very appropriate way to the structural and policy changes needed in the Interior Department's management of trust funds. The changes that need to be made in the bill can now be made rather quickly and should enable us to move the bill prior to adjournment of the 107th Congress.

Some of the major policy recommendations of the Task Force, including establishment of an independent trust commission and development of fiduciary standards, obviously require additional deliberation, as stated by the Tribal Task Force co-chairs in the hearing earlier this morning. While most generally agree that independent oversight is necessary, including myself, the best way to structure that oversight is still open to considerable debate. If such a proposal can be readied for enactment this year, I will do everything in my power to support that action.

However, I do not believe we should hold back on modifications to S. 2212. It is clear to even the most casual of observers that change in the underlying law is needed and it is needed now. We have been through countless hearings, GAO investigations, and court battles on this matter. Further delay in the changes we know we can make now will only continue the long and sorry history of mismanagement.

In recent days the Federal courts have found it necessary to accept an even larger role in dealing with the consequences of mismanagement by the Department and Congressional inaction. In the absence of congressional action this year, the Courts will become increasingly more involved and exercise more authority in areas entrusted to the Congress under the Constitution.

The bottomline is, the status quo is unacceptable. S. 2212 provides significant reform and a framework for the tribes, the Department and the Congress to continue to work toward a full solution to the problems involved in the management of Indian trust funds and assets. S. 2212 embodies a structural reform proposal that can be modified and enacted this year. I, along with Senators Daschle and Johnson, stand ready to work with you to make it happen.

PREPARED STATEMENT OF CLIFFORD MARSHALL, CHAIRMAN, HOOPA VALLEY TRIBE OF CALIFORNIA

I am Clifford Marshall, chairman of the Hoopa Valley Tribe. I appreciate the opportunity to submit my testimony for the Senate Committee on Indian Affairs hearing record regarding the trust reform and related matters. Because trust reform will effect the ability of tribes to develop stable governments for the next several decades, I urge the committee to take the necessary time to assess the impacts on Indian country before moving forward with proposals that are based on vague short term concepts rather than addressing longstanding problems.

There have been two forms of trust reform that have been underway for the past several years, one initiated by tribes and the other by the Federal Government. These are two very different approaches. The tribal approach focuses on Indian country, while the Federal approach has been one focused on inside the Beltway using consulting firms that have little experience in Federal Indian trust and tribal government matters.

Regarding tribal efforts, tribes have been involved in various forms of trust reform activities since the first treaty was entered into and the trust relationship was es-

tablished. At least part of the tribal trust reform efforts have been designed to address problems associated with the underfunded BIA Indian programs. For example, comparisons between the budgets of Indian programs to those for federally owned lands and resources demonstrate that Indian forest programs receive only 35 percent of the funds appropriated for management of the United States' own lands and that Indian roads maintenance programs only receive 30 percent of Indian road maintenance needs. It was this type of underfunding, coupled with the lack of local tribal control over management of reservation affairs, that led to the development of such laws as the Indian Self-Determination and Tribal Self-Governance Acts.

Information that was submitted to the Task Force by the tribe demonstrates that tribal and individual Indian beneficiaries, as well as the United States, receive a benefit of \$3 of non-BIA funds for every \$1 of BIA compacted/contracted funds as a direct result of the tribal efforts in furthering tribal trust reform activities (SEE ATTACHMENT). Clearly, this information indicates that the Tribal Self-Determination and Self-Governance initiatives are very beneficial to the goals of reforming Indian trust programs.

Regarding Federal trust reform efforts, it has been both frustrating and costly for tribal governments over the past few years to chase around Indian country the most recent recommendations of consulting firms who've been awarded multi-million dollar contracts by DOI. It certainly is very revealing of the Federal efforts to have spent over \$760 million thus far, but we have yet to find meaningful solutions and many of the consultant proposals have been universally rejected by the tribes. Unfortunately, the most recent Federal trust reform efforts have focused almost entirely on restructuring or eliminating the BIA's trust management functions without spending any time to analyze whether the new organization will simply fall into the same old problems that brought us to where we are today.

DOI officials say that status quo of the BIA is unacceptable, and restructuring is necessary if trust reform is to be successful, including "realignment" of the lower levels of the BIA. (Task Force Report, p. 27). This proposed realignment initiative includes the probability of segregating trust asset management functions and budgets from the BIA Regional, Agency and Sub-agency offices for transfer to a trust service centers. While there has been discussion about the local BIA Regional and Agency offices "contracting" with the trust service center to maintain local trust asset management functions, it is more likely that these functions will be permanently removed from the local offices since the budgets will no longer be available to support them.

The American Indian Trust Funds Management Reform Act of 1994 (Reform Act) established the Special Trustee for American Indians and gave that position a significant amount of control over trust reform efforts. Despite the fact that Office of Special Trustee (OST) was supposed to only provide an oversight function—not a program implementation function, Congress began appropriating substantial amounts of funds for the OST budget. OST then assumed control over the BIA Office of Trust Funds Management, then assumed control of the historic accounting functions, most recently appraisals, and probates are expected to follow. Today, OST has stopped being the oversight function as originally contemplated in the Reform Act and has now become part of the problem. In effect, OST is now what the BIA was 12 years ago—and the problems continue to escalate and few are being resolved. For example, it was the failures of the OST's Office of Trust Funds Management system that resulted in the complete shut-down of the DOI computer systems that were connected to the OTFM systems. In effect, the DOI computer systems had to be disconnected because proper safeguards were not incorporated in the OTFM systems that would prevent outsiders from improperly accessing trust information. Clearly, OST has now become a major part of the problem that must be fixed if trust reform is ever to be successfully implemented.

Congress mandated in the Reform Act that a comprehensive plan be developed, in consultation with tribes, and submitted to the House Resources and Senate Indian Committees for review. To complete the framework for trust reform, the Reform Act also contains a mandate that the Special Trustee certify in writing the adequacy of the trust reform budgets. of the BIA, BLM, and MMS. Unfortunately, neither of these, statutory requirements has been complied with. I believe that the present state of the Federal trust reform is in the state of chaos that we see today largely because of these critical failures by OST in complying with these legal mandates.

To address trust asset management, DOI has proposed to fragment Indian services into two or more agencies. If one fully implemented these proposals, Indian country would become the only place in the Nation where a tribe or individual Indian will be required to go to multiple agencies just to get permission to start businesses, create employment, implement welfare reform programs, build roads, have

adequate housing fight fires, use resources and lands, and so on.. Despite the fact that Indian people today are more regulated than any other group around the Nation, separating BIA functions into multiple organizations will require a substantial amount of new funds just to maintain the same level of services that are being provided today. Indian services will be reduced in favor of paying for more Federal bureaucracy. Unfortunately for tribes, none of the proposals analyzes what impacts will occur to the regional and agency offices where 95 percent of the services in Indian country are provided.

Based on an analysis of BITAM submitted earlier by the tribe, any option that separates the BIA functions into multiple organizations will cost at least \$10 million of new or reprogrammed funds just to hire additional supervisors, assuming that the same level of BIA employees will be maintained. Additional funds will likely be necessary once the new organization determines what service it will provide to tribes and individual Indians. With respect to contracting and compacting with tribes, there will likely need to be amendments to various Federal statutes, including the Indian Self-Determination and Self-Governance Act, to provide for mandatory contracting/compacting requirements for any new non-BIA organization.

Restructuring of the any Federal agency must be done in accordance with pre-determined plans, with identified and measurable goals and specific timeframes, none of which presently exist for restructuring Indian affairs today. Restructuring for the sake of restructuring is typically not the best use of limited resources, funds or time. Quite simply, changing employee name tags and agency addresses will not fix trust problems. Over three-quarters of a billion dollars have been spent by Federal officials and numerous consultants in the name of trust reform and little benefits have been demonstrated from the results. Yet tribes continue to struggle with under-funded programs, largely because of the unwillingness of Federal officials to provide funding and resources at the local tribal government levels, where clear progress is being made as tribes have consistently corrected problems and brought stability to local trust services under the Self-Determination and Self-Governance Acts. It seems clear that the Federal Government has simply been investing in the wrong solutions.

With respect to the DOI consultation process for the Task Force report, we are concerned that the process is not proceeding in a manner that will provide meaningful input from tribes and individual Indians regarding trust reform activities. Quite simply, DOI cannot expect that having just over 30 days for review and comment on such a major effort provides any level of reasonable consultation with tribes across the Nation, even if the Task Force report were to be expanded to include sufficient information with which to make an independent assessment of the Task Force's recommendations. It has also been explained that the EDS contract is supposed to provide additional substantive information regarding how the options will impact the local levels of the BIA. Further, no explanation has been provided to reconcile the fact that the Task Force's report to the Secretary will be submitted in July while the EDS analysis won't be completed until December.

Trust Reform Budget Requests. The tribe does not believe that DOI has given fair consideration of budget needs to implement trust reform measures. Past needs-based budgets submitted to tribes during national budget meetings indicate that there is a need of approximately \$7.0 billion to adequately fulfill the trust obligations to tribes and individual Indians, as compared to the existing BIA budget of approximately \$2.2 billion. Instead of dedicating more limited funds and resources toward reorganization of the BIA, the Hoopa Valley Tribe believes that DOI must aggressively work toward securing adequate funds and resources to implement the Federal trust obligations to tribes and individual Indians. Without both adequate funds and commitment to engage tribes into every phase of the trust reform efforts, no trust reform plan can be successfully implemented.

With respect to S. 2212, the tribe strongly believes that there must be a legislative solution to trust reform problems if they are ever going to be resolved. Quite simply, there is presently insufficient legal guidance and authority to address the trust management issues that we are confronted with today. S. 2212 provides a sound beginning point for the legislative package.

Our comments on S. 2212 are as follows:

No. 1. We agree with S. 2212 that the BIA structure must be kept in tact. Besides not having the time or funds to construct a new Indian agency, the exercise of separating trust functions between resource management and other trust services will undoubtedly become an insurmountable task. The Hoopa Valley Tribe opposes DOI proposals that fragment the BIA into two or more agencies because we believe that it will ultimately lead to the destruction of Indian services and diminishment of trust responsibilities owed to tribes and individual Indians by the United States.

No. 2. We disagree with section 307 of the bill that there is a need for a new Deputy Secretary for Trust Management and Reform. We believe that the bill correctly defines the trust duties for trust asset management and that the existing Assistant Secretary for Indian Affairs can appropriately address trust reform issues provided that the necessary funding and resources are made available to the BIA.

No. 3. We wholeheartedly agree with the provision contained in the bill that provides for the development of resource management plans. We believe that this is one of the key cornerstones to ultimately resolving the differences between tribes, individual Indians and the United States with respect to management of trust lands and resources. Again, adequate funding must be made available to accomplish this goal and adequate flexibility must be provided to tribes and individual Indians to contract for the development of the plans.

No. 4. We recommend that a provision be added to the bill that will facilitate the development and submission of adequate budgets necessary to properly manage trust assets and to fulfill the trust responsibilities of the United States to tribes and individual Indians. We suggest that language be included that mandates that the annual BIA Unmet Needs budget be reviewed so that annual budgets provide a reasonable method of increasing the funding levels of the BIA on a regular basis to meet the unmet needs.

No. 5. We recommend that a section be added that would establish a new Division of Indian Claims within the DOI Office of Hearings and Appeals. Throughout the years of tribal deliberations regarding trust reform, tribes have expressed frustration from not having access to information that is controlled by the United States that would help to facilitate the development of claims, in order to resolve these claims through mediation, negotiation, litigation or legislation.

No. 6. We recommend that provisions be added to the bill that would facilitate resolution of the breaches of trust that have been identified by the *Cobell* Court.

PREPARED STATEMENT OF NEAL MCCALEB, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. Chairman and members of the committee, I am here today to provide to the committee the Administration's position on S. 2212, the proposed "Indian Trust Asset and Trust Fund Management and Reform Act of 2002" sponsored by Senators McCain, Johnson, and Daschle.

The Administration is strongly opposed to the enactment of S. 2212, and recommends instead that the recommendations of the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform be enacted, where there has been agreement. While well intentioned, S. 2212 does not reflect the consensus of the Tribal Task Force.

In the remarks Senator McCain made when the bill was introduced, he stated that Congress should give careful consideration to the recommendations of the Task Force. The Department learned a valuable lesson last year when it proposed the formation of a new Bureau of Indian Trust Asset Management prior to consulting with the tribes. This proposal was soundly rejected by tribal leaders. They were particularly concerned that the Department and the tribes had not sat down together to discuss the concept before it was proposed.

Similarly, S. 2212 was introduced in the Congress without any discussions or review by the Department of the Interior or the broader tribal community. The provisions of S. 2212 are at odds with the work of the Task Force. Enactment of these provisions after the Department and tribal leaders have met at multi-day meetings in seven different locations over the past 7 months would seriously undermine the consultation process and the work of the Task Force.

The Administration is strongly opposed to creating another Deputy Secretary position within the Department of the Interior. No other Department within the executive branch has more than one Deputy, or a Deputy with a particular mission other than the overall responsibility of the Secretary. We have reached agreement within the Task Force to recommend the creation of an Under Secretary for Indian Affairs who would be appointed by the President and confirmed by the Senate, the creation of a new Office of Self-Governance and Self-Determination that reports directly to the Under Secretary, and the creation of a Director for Trust Accountability.

The Under Secretary would have direct line authority over all aspects of Indian affairs within the Department. This would include the coordination of trust reform efforts across the relevant agencies and programs within the Department to ensure these functions are performed in a manner that is consistent with our trust responsibility. This reorganization will require narrowly tailored legislation. We would be

happy to provide to the committee draft legislative language that embodies the duties agreed upon by the Department and the Tribal Leaders on the Task Force.

We also object to the creation of an Office of Trust Implementation and Oversight. This is not the model we have developed in our consultation with the tribes through the Task Force. Also, we do not believe that the proposed 10-year Indian Trust Fund and Trust Asset Management and Monitoring Plans authorized by the bill will meet their goal of assisting tribes in moving toward self-governance and self-determination.

In addition, we have concerns with the list of duties of the Office of Trust Reform Implementation and Oversight enumerated in section 2(b), which adds a new section 307 to the American Indian Trust Fund Management Reform Act of 1994. Many of the duties in section 307(e)(3), as currently drafted, are overbroad and imprecise, and serve only to further confuse the issue of what obligations the trustee has. For example, section 307(e)(3)(H) imposes the duty to “ensure . . . the greatest return on those funds and assets.” The proposed language arguably does not permit the Government to analyze the claimed liquidity needs or to consider the compound interest needs of any particular individual or tribal owner of trust funds before it invests such funds. Additionally, the proposed language appears intended to extend the Government’s responsibility regarding trust asset management beyond that established by Supreme Court precedent, with the potential to affect ongoing litigation over the scope of the government’s fiduciary duties.

We also have concerns regarding the obligation to manage the funds in accordance with all applicable tribal laws. This requirement carries the possibility of altering the trust duties of the Secretary in differing ways depending on which tribe’s plan was involved, which could make the Department’s administration of its “inconsistent responsibilities” practically very difficult and subject to litigation risk.

For these reasons, we recommend that the committee put S. 2212 aside, and consider instead legislation that reflects the recommendations of the Task Force. Those recommendations include creation of the Under Secretary position mentioned above, creation of a new Office of Self-Governance and Self-Determination that reports directly to the Under Secretary, and creation of a Director for Trust Accountability. The Task Force has also agreed on the concept of creating an independent commission that would provide oversight on the management of trust funds and other issues. Our work on that proposal is not yet complete. We are hopeful that we will finalize the commission proposal in August. We look forward to working with the Committee on these provisions during the next few weeks.

This concludes my statement. I would be happy to answer any questions the committee might have at this time.

INTERTRIBAL MONITORING ASSOCIATION on Indian Trust FundsPhone: 505/247-1447 Fax: 505/247-1449 e-mail: itma@flash.net**2ND DRAFT****2ND DRAFT**

STATEMENT
of
INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds
on
S. 2212
"Indian Trust Asset & Trust Fund Management & Reform Act of 2002"
before the
U.S. SENATE COMMITTEE ON INDIAN AFFAIRS
JULY 30, 2002

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following 54 federally recognized tribes: Central Council of Tlingit & Haida Indian Tribes, Kenaitze Indian Tribe, Metlakatla Indian Tribe, Hopi Nation, Tohono O'odham Nation, Salt River Pima-Maricopa Indian Tribe, Hoopa Valley Tribe, Yurok Tribe, Soboba Band of Luiseno Indians, Southern Ute Tribe, Nez Perce Tribe, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Sault Ste. Marie Tribe of Chippewa Indians, Grand Portage Tribe, Leech Lake Band of Ojibwe, Red Lake Band of Chippewa Indians, Blackfeet Tribe, Chippewa Cree Tribe of Rocky Boy, Confederated Salish & Kootenai Tribe, Crow Tribe, Fort Belknap Tribes, Fort Peck Tribes, Northern Cheyenne Tribe, Winnebago Tribe, Walker River Paiute Tribal Council, Fallon Paiute-Shoshone Tribes, Jicarilla Apache Tribe, Mescalero Apache Tribe, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Sandia, Three Affiliated Tribes of Fort Berthold, Turtle Mountain Band of Chippewa, Absentee Shawnee Tribe, Alabama Quassarte, Cherokee Nation, Kaw Nation, Kiowa Tribe of Oklahoma, Muscogee Creek Nation, Osage Tribe, Quapaw Tribe, Thlophlocco Tribal Town, Confederated Tribes of Umatilla, Confederate Tribes of Warm Springs, Cheyenne River Sioux Tribe, Sisseton-Wahpeton Sioux Tribe, Chehalis Tribe, Confederated Tribes of Colville, Forest County Potawatomi Tribe, Oneida Tribe of Wisconsin, Eastern Shoshone Tribe, and the Northern Arapaho Tribe.

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is pleased to provide these views to the Senate Committee on Indian Affairs regarding S. 2212, introduced on April 18, 2002, by Senators McCain, Daschle, and Johnson. ITMA was greatly heartened earlier this year by Chairman Inouye's firm commitment to this Committee's determination to provide continuing oversight to the Department of Interior's Indian trust reform efforts. We want to express our appreciation especially as well to Vice Chairman Campbell's leadership in securing legislation to address the statute of limitations issue that has already prompted at least 20 federal lawsuits by tribes. These tribes continue to fear the government's continuing legal strategy of concealing material facts until the period for legal or equitable redress has expired.

Agreement with basic principles of S.2212

Regarding S.2212, we want to encourage the Committee to stay with the concept of a full Deputy Secretary to oversee trust administration and reform in the Department of the Interior. We have noted that the Task Force and the Department are considering alternative proposals that involve additional assistant secretaries, or a new position of an "Under Secretary." ITMA is convinced that any organizational level below that of Deputy Secretary will find itself hamstrung by career officials in the Assistant Secretariat for Policy, Management, and Budget and in the Solicitor's office.

We also heartily applaud the importance that S.2212 attaches to the concepts of self-determination and self-governance, as they have been incorporated into federal Indian law and policy over the past 30 years. We agree with the bill's sponsors that any organizational response to trust reform must maintain the viability of these principles, including the flexibility inherent in them for tribes to design and administer their own programs and properties.

WHAT'S MISSING IN S. 2212

Recognizing the elephant in the room: It has been more than twenty years since the administration of the Indian trust within the Department of the Interior even remotely resembled the statutory framework created by the Congress for that purpose. For more than two decades, the Congressionally authorized and established position of the Commissioner of Indian Affairs has deliberately been left unfilled by a succession of Administrations of both parties. Oversight Committees of Congress under the leadership of both parties have acquiesced in this somewhat haphazard arrangement, allowing career employees to substitute for a position the Congress intended to be filled by Presidential appointment. The administratively created position of Assistant Secretary of Indian Affairs has resulted in elevating the political presence of Indian affairs in the Department, while ignoring the position created by Congress to run the

agency delivering Indian trust services. S.2212 provides the first opportunity in many years to revisit legislatively the organization of Indian trust services.

Transparency: The single, most used word in public discourse today is noticeably absent in any discussion of Indian trust reform, and it is badly needed here. As a nation today, we want transparency in the governance of the Palestinian Authority, in Russia's compliance with the recent nuclear disarmament treaty, and in the reporting of publicly traded companies in our markets. Investors want transparency in financial statements. We want transparency in the accounting profession. We want transparency into the workings of FannieMae and FreddieMac. Ratings agencies want transparency into the level and quality of debt of the finance arms of manufacturing companies. The chairman of the Securities and Exchange Commission, the Deputy Secretary of the Treasury, the National Security Advisor, and the financial press have all joined the clamor for more transparency in our reporting and our dealings based ultimately on trust. If every single one of these instances of the cry for transparency shares a single common denominator, it is this: The entity whose dealings are opaque and, perhaps, self-serving and misleading, has not and shows no sign of adopting a policy of transparency in its dealings without pressure from an outside force that is powerful enough to demand it. Only the Congress of the United States can demand transparency in the government's Indian trust administration, and ITMA urges this Committee to take this issue head-on and to demand it relentlessly. ITMA further suggests this Committee will be amazed at the extent to which it has been materially misled over the years with respect to the state of Indian trust administration.

Culture of Trust: Ultimately, trust administration is a uniquely human enterprise. Accounting systems, TAAMS systems, appraisal software, financial reporting regimes, and all the accoutrements of the automated, electronic age are but tools in the hands of men and women who exercise individual judgments dozens of times a day. If the culture in which these men and women work does not reward honesty, integrity, and rectitude, then all the most efficient and powerful tools known to man will not be employed in an honorable enterprise, one worthy of the trust of those whom it is supposed to serve. The culture in which Indian trust administration is carried out today, and has been carried out for decades, is one of fear, retaliation, cover-up, dissimulation, and retribution. This is not a culture in which trust can survive, much less flourish. This Committee and this Administration have a magnificent opportunity to bring a culture of trust and honor to Indian trust administration, and ITMA looks forward proudly to the opportunity to participate in this aspect of Indian trust reform, without which no other reform will long survive,

Concerns with level of detail in S.2212

Audit of each account. We believe that some of the detailed provisions of this

bill will benefit greatly from further deliberation. The requirement that each trust fund account be audited annually, for instance, is probably not wise. Many of these accounts have fewer than \$10 and no activity. To commission a separate audit of each of the more than 225,000 accounts would be an enormously expensive undertaking. On the other hand, we do agree that the present practice of a single, annual audit of the entire portfolio is probably not adequate. We believe that the recent audits have neither

sufficiently inquired into the source of funds, nor do they approach the reports of contributing agencies with appropriate skepticism regarding their accuracy. We would like to work with the committee and the Department to discuss other ways to stratify these accounts for audit engagements. Perhaps the accounts into which royalties and rents are paid for the mining of more than 25 million tons of coal per year could be audited separately by a firm with some expertise in solid rock mining operations. Similarly, perhaps oil and gas revenues into the trust fund portfolio could be audited separately, as could grazing, timber, and other similarly grouped sources of revenue. We are not firmly wed to this concept, but we do believe the subject merits greater deliberation than it has received from the Committee to date. In any event, some stratification of the accounts for audit engagements, utilizing audit sampling techniques appropriate for the class of accounts, would be an enormous improvement over the present audit regime.

Inventory of trust assets. Likewise, we think the requirement for an inventory of all trust assets is stated far too broadly. This requirement, if read literally, would consume enormous quantities of human and fiscal resources, and would not contribute to any of the immediate trust reform needs. A tribe that has no interest in strip mining coal, for instance, might have much more immediate needs than the drilling, chemical analysis, mapping, and estimating of the extent and value of its reserves, for instance. Similarly, a mountain of copper and molybdenum for which there is no immediate or foreseeable market is probably not a good candidate for significant inventorying expenditures, etc. We do not mean to suggest that asset inventories are not desirable. In fact, significant sums are already being spent on mineral, timber, and grazing inventories. People at the agency and reservation level should direct these dollars. If the intent is simply to develop an accurate list of assets and funds for inclusion and reporting to beneficiaries, then the requirement makes imminent sense. We suggest that this provision could be written more clearly to state the purpose for which the inventory is intended.

We suggest, further, that the Department be ordered to conduct an inventory of its view of the scope of its duties with respect to the management and administration of the trust corpus. The government has paid out over one billion dollars in claims and judgments since trust reform became a priority item, and it has not paid one cent of that for failing to inventory the asset. It has paid every cent of that for failing to recognize, or for violating, some duty owed to the beneficiary. This effort would pay much greater dividends than inventorying passive assets. If the beneficiaries or the Congress should take issue with the Department's own view of its duties, at least the issue would be

joined where it should be, in open debate. For too long, these decisions have been made behind closed doors, often more concerned with potential liability, cover-up, or political embarrassment than with honorable trust administration.

Monthly Statements to all Account Holders: A third area of detail contained in the bill that we suggest further deliberation on is that regarding monthly account statements to each account holder. For accounts with fewer than five or ten dollars and no activity over the course of a past year, for instance, it might suffice to generate quarterly reports

on them so that appropriate officials can examine them for unexpected or suspicious activity. So long as there are tens of thousands of account holders whose whereabouts are unknown, it will be quite simply impossible to provide them with monthly statements. To impose a requirement for monthly statements when it will be no one's right or duty to review them will simply be to impose an onerous, meaningless exercise that will breed disregard for the law. We suggest that this provision be written to require monthly statements for every account with more than \$100 in it, and quarterly or semi-annual statements for smaller and inactive accounts with a requirement that these statements be reviewed for anomalies and segregated for audit purposes.

Tribal Trust Management Plans: ITMA does not think the requirement for 10-year trust management plans is either wise or desirable at this point in trust reform. It is almost an inviolable principle in representative government that one legislature cannot bind a future one, and hardly any tribal administration serves 10 years without opportunity for change. The development of more than 500 separate tribal trust management plans will be an enormously expensive undertaking, and virtually every plan will be reviewed by at least two new administrations during its term. The time spent in developing these plans will almost certainly be matched by the time spent in revising, amending, modifying, or repudiating them. ITMA is not aware of any other representative unit of government in the American system that is subjected to such plans laid down by a predecessor administration, that cannot be changed without the advice or consent of the United States of America. Only the constitutions of the various states come to mind as even close to such a requirement.

ITMA is not opposed to planning, and commends the intellectual contributions made by the authors of this bill. Toward this end, ITMA believes that this Committee should work with the appropriations committees to see that funds are made available for tribes who want to work cooperatively with the Department to develop such plans. ITMA simply does not believe that such a requirement should be written into the Supreme Law of the Land when no other unit of government in our Republic has such a requirement. Without enormous, supporting appropriations this requirement would become simply an unfunded mandate.

Requirement for implementing regulations: ITMA suggests that the bill's requirement that the Secretary issue implementing regulations within one year is neither desirable nor likely to be effective, in any event. ITMA believes the Deputy Secretary

created by this legislation would find himself or herself unnecessarily constrained if the Secretary is provided with both a window and a requirement to promulgate regulations for implementing this legislation, even before the individual who has that responsibility is in place. ITMA believes the Deputy Secretary should be put in place first, and then provided a window to consult and confer regarding the need for implementing regulations. It is by no means clear what parts of the bill, if any, need regulations to implement the legislation. The Secretary already has the authority to issue regulations, and legislated timeframes for doing so have not historically accelerated their promulgation.

What the bill does not do:

Legal duties and representation. This bill is totally silent on the issue of legal representation of those officers charged with administering the trust. The Special Trustee has suggested for some time that he should have access to legal representation that is free from the political considerations of the Department. So long as the Office of the Solicitor takes direction from the Department of Justice on legal matters that pose potential liability to the government, the Indian beneficiaries are denied the degree of loyalty, fair dealing, good faith, disclosure of material facts, and other benefits associated with a trust relationship. If this matter is not addressed, the end result will be a continued shell game with penalties awarded to those who protect the Secretary from embarrassment and retaliation against those who would perform as honorable stewards, even when the result is embarrassing.

This is no small issue. ITMA has pointed out before that no sizeable human endeavor is going to be error-free for long. There will be mistakes; there will be errors and omissions; there will be systems failures; there will be misreporting by those who utilize Indian resources; there will be misreporting by other agencies who transmit monies to the trust funds; there will even be wrongdoing. No one expects Indian trust administration to be free from these human and systems shortcomings. What Indians do have a right to expect is honesty, forthrightness, full disclosure, and prompt redress. So long as the legal officers of the government can prevent Indian beneficiaries from realizing these legitimate expectations, Indians' faith in the system will not be restored.

ITMA would like to join this Committee in examining the duties of lawyers for trusts in other contexts. We believe that the attorneys for the Department of the Interior should be visited with a statutory obligation to acknowledge a duty to the trust beneficiary when they are made aware of mistakes or other violations of trust duties.

Rewards and Sanctions: This bill does not address the historic practice of rewarding those in government service who make problems disappear, rather than surfacing them for honest debate and honorable resolution. Employees who have taken issue with public pronouncements, who have taken the risk of telling the emperor he has no clothes, have too often been visited with retaliation and virtual banishment

from future meaningful service. We believe the bill should provide for rewards for employees who discover and report mistakes or other failures in the system of trust administration.

Administrative fees and privatization: The bill is silent on the issue of administrative fees for trust services, and the privatization of trust administration. ITMA suggests any bill should repeal the current statutory authority contained in 25 U.S.C. 413 for imposing administrative fees on the administration of the Indian trust. ITMA believes the current regulatory requirement for imposing these fees on surface leases is no less than a moral outrage. Until the government demonstrates that it can collect for Indians, it should not be in the business of collecting for itself, especially when appropriations have been provided for this purpose. There was absolutely no honest

reason given for including this provision in regulations published last year, and the reasons given are transparently false, misleading, and dishonest. The putative reason is to "cover the cost" of processing transactions. The cost of processing an original lease involving environmental reviews is not remotely comparable to the cost of processing a subsequent transfer of those leasehold rights. Yet, the administrative fee is the same for both. The 3% figure for calculating these fees is drawn entirely from thin air and has no calculated, estimated, or otherwise discernible relation to the putative basis for the fee.

Similarly, the current Administration has already been busily investigating the possibilities of privatizing entire sectors of the trust estate administration, with absolutely no discussion of the matter with tribes or individual beneficiaries. ITMA strongly urges the Congress to prohibit the privatization of Indian trust administration without appropriate, prior consultation with both the oversight Committees of Congress and the trust beneficiaries affected by such a move. ITMA realizes and applauds the success of OTFM in securing the commercial services of private sector vendors for such activities as custodial services of securities and accounting systems, but does not believe that this provides a model for other asset management functions that Indians should be required to accept sight unseen and as a fait accompli. In addition, OTFM consulted throughout its initial accounting and auditing procurement processes with ITMA and tribal clients regarding such matters as customizing and timing of reports. The remainder of the Department has shown no such inclination in its other privatization deliberations.

RECOMMENDATIONS

ITMA recommends that the Committee continue to use S.2212 as a discussion bill for fleshing out the issues raised herein and by other witnesses appearing before the Committee.

ITMA suggests that this Committee consider moving this bill forward simply to accomplish its basic, twin objectives. Those would be creating the position of a Deputy Secretary for Trust Management and Reform, and legislating a pivotal role for the policies of self-determination and self-governance in Indian trust administration. The other issues addressed by the bill, as well as those suggested herein by ITMA, could then be considered as priority issues for subsequent or companion legislation.

ITMA acknowledges that this bill does not address the issue of past failures, losses, or settlement of account balances. Nevertheless, ITMA suggests that the remaining, most immediate needs for trust reform legislation are currently not adequately addressed in S.2212. Until the issue of accurate account balances is resolved, the Department will never be in compliance with the 1994 Indian Trust Funds Management Reform Act. Resolving that issue will require dealing with settlement for past failures and losses, and dealing with past failures and losses will require a

commitment to fair dealing and full disclosure that the Departments of Interior and Justice have successfully resisted to date.

Accurate accounting for trust accounts in the future will require a method of accounting for and posting earnings to IIM accounts that has eluded resolution for nearly thirty years, at least. ITMA suggests the Congress authorize and direct a method of calculating and posting earnings to the IIM pool that gives legitimacy to the method adopted and increases the liquidity of IIM holdings. This could take the form of a par value fund, or some other structure that permits a daily account balance to be determined, and is fair to all account holders.

If the decision of the Committee is to address these other, substantive trust reform objectives in this or companion legislation, then ITMA looks forward to working with the Committee in addressing the issues and concerns raised in this statement.

ITMA urges this Committee not to become mired in the details of asset and fund administration, but to focus on bringing *transparency* and a *culture of trust* to Indian trust administration.

Thank you for your consideration.

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Chairman, Lower Brule Sioux Tribe
July 30, 2002
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**Testimony
Of
Chairman Michael Jandreau
Lower Brule Sioux Tribe
before the
United States Senate
Committee on Indian Affairs**

Chairman Inouye, Senator Campbell, members of the Committee, thank you for holding this important hearing on the critical topic of trust fund reform and S. 2212, the Indian Trust Fund and Asset Management and Reform Advancement Act of 2002, and for the opportunity to testify. I am appearing this morning in my capacity as the chairman of the Lower Brule Sioux Tribe and as a member of both Great Plains Tribal Chairman's Association and the Secretary of Interior's Task Force on Indian Trust Reform.

Mr. Chairman, as you know, there are many challenges facing us in Indian Country – from tribal economic development, to Indian health care, to education. But none more critical

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than the Federal Government's management – or mismanagement – of the funds it has collected on behalf of Indian people and tribes across the country. The management of Indian trust assets goes to the very core of the trust responsibility that the Federal Government owes to Indian peoples. The Great Plains tribes, and countless others across the United States, sacrificed millions of acres of fertile, sacred land in exchange for certain guarantees from the Federal Government. Among those were military protection, and guarantees of water, hunting, fishing, and mineral rights.

Throughout the Nineteenth Century, the Federal Government negotiated treaties with Indian tribes as sovereign nations. These treaties formed the basis for the Federal Government's trust responsibility towards Indian tribes . . . a fact that has been repeatedly recognized and reaffirmed by the federal courts and the Congress.

We are not talking about the Federal Government's money – this is Indian people's money. This is revenue that has been generated from land owned by Indians and tribes, and held in trust by the Federal Government for the benefit of its owners. According to the most recent available figures, the Federal Government maintains over 1,400 trust accounts for 260,000 individual Indians and 315 recognized Indian tribes. By some estimates, the Federal Government owes over \$9 billion in trust revenue to Indian peoples and tribes. Tragically, the Federal Government cannot make a true and accurate accounting for how much has been collected, how much should be collected, how much is owed, and to whom. This despite the fact that the

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Federal Government has a fiduciary responsibility and is charged with the highest standard of care.

While pending lawsuits seek to compensate Indian peoples and tribes for past errors, the fundamental structure of the Department of Interior must be changed if we hope to prevent more turmoil and mismanagement in the future. Furthermore, these lawsuits address only with the Federal Government's responsibility toward *individual* Indian trustees. While it is important that individuals are fairly treated and properly reimbursed for the revenue generated by their land, the Federal Government's overall trust responsibilities are much broader than that, and do not run to individual Indians but to *tribes*. It is the tribes, as distinct and sovereign nations, with which the Federal Government negotiated and signed treaties. It is the tribes that exist to preserve the social, cultural, and religious heritage of Indian peoples. Thus, Federal efforts to properly administer Indian trust obligations must recognize the role of the tribes.

Congress has attempted to address this issue on many occasions, the most recent being the American Indian Trust Fund Management Reform Act of 1994. That year, it created the Office of American Indian Trust, which is headed by the Special Trustee for American Indians. This special trustee was to prepare a comprehensive plan for trust fund management reform and then enact those reforms. The Office would then dissolve once the problems were addressed. Needless to say, the Office of American Indian Trust still exists, because the problems still exist. I acknowledge this was a well-intentioned step, but it did not provide the solutions needed to

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address this problem.

In response to the ongoing trust management problems at the Bureau of Indian Affairs (BIA), and ongoing litigation, Interior Secretary Norton announced a plan for reorganization in November of last year. She planned to remove the trust management authority from the BIA and place it in a new agency, the Bureau of Indian Trust Asset Management (BITAM). This plan was developed, announced, and implementation was begun before any tribal leaders were consulted. This was an unacceptable process that developed an untenable result.

For many reasons, BITAM is not the correct solution to the Indian trust problem. Most importantly, it severely fragments the authority BIA needs to administer the numerous and diverse Indian programs and also deal with problems facing Indian Country. It does so by removing one of BIA's core functions and sending it to an unconnected agency. To do so would simply dilute the power of the current Assistant Secretary for Indian Affairs and further fragment the authority of the BIA. Indian Country needs a strong BIA with clear authorities and adequate resources. Therefore, we oppose BITAM.

We do support S. 2212, the Indian Trust Fund And Asset Management And Reform Advancement Act of 2002. This bill was developed in consultation with Indian leaders and points us in the correct direction. It will bring additional resources to bear on the problem, and more importantly, it will concentrate the power to handle Indian affairs within one office and make one individual responsible and accountable for change. It would also create an advisory

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board to provide the Secretary with advice on trust reform matters and make the existing Special Trustee report directly to a Deputy Secretary for Trust Management and Reform. Finally, the law would give Indian tribes discretion to develop their own plans for managing tribal trust funds. This authority would enable them to supervise the collection and distribution of these funds, while maintaining access to the Federal Government's expertise and guidance in trust management matters.

While we may seek additional changes as this legislation progresses, the Great Plains Tribal Chairman's Association and the Lower Brule Sioux Tribe advocate making one significant change to S. 2212 at this time. We feel this bill should mandate and create a Deputy Secretary for Indian Affairs who is responsible for both trust management activities and all other duties currently under the charge of the BIA. The Department of Interior would then have two deputy secretary positions – a Deputy Secretary of Indian Affairs and a Deputy Secretary of Interior – both of equal stature within the Department. The Deputy Secretary of Indian Affairs could then, in turn, supervise two Assistant Secretaries: an Assistant Secretary for Indian Trust Assets, and an Assistant Secretary for Indian Programs with their responsibilities divided accordingly.

These changes would raise the prominence of Indian responsibilities within Interior, and establish a clear chain of command from the Deputy Secretary for Indian Affairs to the Secretary and ultimately to the President of the United States. We feel that only in this way can we be

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assured these ongoing problems will receive the attention, resources, and structure that they need to ensure they are properly addressed.

In closing, let me assure you that Indian people take very seriously the trust obligations owed to them by the Federal Government. These responsibilities stem from the agreements, negotiated in good-faith, between the United States of America and Indian tribes as autonomous, sovereign nations. Significantly, these agreements between the United States and Indian nations are codified in treaties – the highest law of the land. This special status has been repeatedly recognized by Congress and sanctified by federal courts throughout this country. In its management of Indian trust assets, the United States federal government clearly has not lived up to its responsibility to Indian tribes and individuals.

Mr. Chairman, my fellow tribal leaders and I stand ready to assist you in your effort to fix this severely broken trust system. The United States of America has failed Indian people. We feel that S. 2212, with some modifications, can begin to remedy the trail of broken promises. Thank you again for an opportunity to address this committee, and I look forward to answering any questions that you may have.

TESTIMONY AND STATEMENT OF
CHAIRMAN EDWARD D. MANUEL
SUBMITTED FOR THE RECORD

TO THE COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

HEARING ON S.2212, A BILL TO ESTABLISH A DIRECT LINE AUTHORITY FOR
THE OFFICE OF TRUST REFORM IMPLEMENTATIONS AND OVERSIGHT ON
INDIAN TRUST FUNDS AND ASSETS
JULY 30, 2002
WASHINGTON, D.C.

Mr. Chairman and members of the Committee, my name is Edward D. Manuel. I am the Chairman of the Tohono O'odham Nation located in south central Arizona. The Tohono O'odham Nation consists of a tribal membership of over twenty-five thousand individuals possessing a land base of approximately 2.9 million acres. I am also a Western Region Tribal Representative serving on the Tribal Leader/DOI Trust Reform Task Force. I thank you for the invitation and appreciate the opportunity to testify before the Committee on S. 2212.

1. **S. 2212 PROVIDES THE INCENTIVE FOR THE ADMINISTRATION TO STAY ENGAGED WITH THE TRIBES TO BRING ABOUT MUCH NEEDED TRUST REFORM.**

Reform of the federal government's failure to adequately meet its duty of trust responsibility to American Indian Tribes is a complicated and difficult matter. Previous efforts at reform have fallen victim to one, or a combination of, political, financial, legal or intellectual factors. Everyone including the Congress, the Executive, the Judiciary, the Tribes and individual beneficiaries recognize the need for change. However, what that change should entail at times

creates disagreement for the parties involved.

One point is certain, Senate Bill 2212, along with other Congressional interest shown in trust reform, has provided the incentive to keep the Bush Administration engaged with the Tribes on reform discussions. To this end, the active participation of this Committee, and the Congress, whether during this Legislative Session or the next, is crucial. Continued Congressional participation is critical, not only in the development of a trust reform plan, but in the successful implementation of that plan as well. This Committee is encouraged to keep trust reform at the top of its agenda during the next Congressional Session. S. 2212 serves as a basis to start the discussion of trust reform and provides a foundation to keep that discourse continuing.

2. **S. 2212 ENCOMPASSES MANY WORTHWHILE IDEAS NEEDED IN ANY LEGISLATION EVENTUALLY PASSED FOR TRUST REFORM. LACKING, HOWEVER, IS THE ELEMENT OF INDEPENDENT OVERSIGHT.**

As written, The American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4001, *et seq.*, may have been successful in the implementation of trust reform. The Act contains many wonderful phrases such as “preparing and coordinating written policies and procedures for each phase of the trust management business cycle,” “imposing standardized procedures,” “reconciling trust accounts,” “preparing accurate reports,” and “maximizing investments.” These requirements, among others, are all elements which the Tribes want to see implemented in the current reform effort. The question is: What went wrong with the 1994 Reform Act?

The Tribes maintain that the lack of success of the 1994 Trust Reform Act was the inability of the Special Trustee to act independently of the actions of the Department of the Interior. Thus, difficult changes crucial for reform were never identified, or if identified, never implemented. While Tribal leaders had input into the drafting of the 1994 Reform Act, the

original intent was to place the Office of Special Trustee outside of the control of the Secretary of the Interior. The Tribes wanted an independent external office with authority to address trust issues. This particular element of the 1994 Reform Act was compromised politically and trust reform was not successful as a result.

S. 2212 lacks provisions that would create an independent external enforcement and oversight body to ensure the DOI's proper performance of the federal government's fiduciary or trust responsibility to American Indian Tribes. Under this proposed legislation, an advisory board is created. This board has no real function other than "to provide advice on all matters within the jurisdiction of the Office of Trust Reform." If implemented as written, this entity will have no real power to mandate needed change should future circumstances prove the necessity for such.

The Tribal Leaders of the Trust Reform Task Force believe an independent body is absolutely necessary for successful trust reform to occur. This independent entity would have the responsibility and authority to audit accounts, conduct investigations, enforce compliance, levy sanctions, monitor corrective actions, establish trust fund standards and regulations consistent with self-determination, and request adequate resources through reports to Congress. The independent entity should be made permanent with its own budget and have the ability to enlist the experts and personnel required for enforcement measures. Members of this entity would include stakeholders from tribal governments and individual Indian accounts, and experts in the field of trust and Indian law, including academia. Should S. 2212 prove to be the vehicle for trust reform, the Bill should be amended to provide for this independent body.

Another crucial problem of the 1994 Reform Act was the fact that Tribes, especially those who had the capability of managing their own trust assets, funds and resources, were

forced to comply with national (one size fits all) standards. No adjustments were allowed to account for the local variations most Tribes encounter when meeting the needs of local constituents. Many Tribes ended up politically opposing the reforms suggested by the Special Trustee due to this lack of consideration for local concerns.

S. 2212 helps resolve this issue by allowing each Tribe the ability to create an “Indian Trust Fund and Trust Asset management and Monitoring Plan.” The plans, once approved, will take local needs into account by providing for the management and administration of funds and assets held in trust by the Bureau and the Tribes. Furthermore, S. 2212 requires the Secretary to comply with tribal law in relation to the management of trust funds and assets unless prohibited by federal law. This is Tribal self-determination at the most fundamental level. Such provisions are critical to the success of any trust reform and must be included in any legislation passed to address the situation.

3. AN INDEPENDENT OVERSIGHT COMMISSION IS LEGALLY PLAUSIBLE.

Questions have arisen as to whether subjecting the Department of the Interior to an independent oversight entity presents constitutional separation of power issues. Under the United States Constitution, Congress has the duty to make laws and the Executive must faithfully execute such laws. Once Congress passes laws, Congress is not allowed to decide how the Executive exercises its implementation responsibility.

In the case of an independent commission, the issue arises as to what branch of government this entity would be located. All governmental entities, which this independent commission will be, must fall within one of the branches of government. If the commission operates under the direction of Congress, an argument arises that Congress would be deciding how the Executive is implementing the trust reform law that Congress passed. This is arguably a

violation of the separation of powers. If the Commission is located within the Executive itself, this defeats the whole purpose of having a commission with “independence” not subject to the control of the Administration. The answer to this dilemma may lie in the unique relationship tribes have with the federal government forged through the guardianship/ward principle developed over the last two centuries.

In the case of Lone Wolf v. Hitchcock, a 1903 decision, the Supreme court stated that because tribes had a guardianship/ward relationship with the United States, this gave Congress, as guardian, the plenary authority to decide how best to manage tribal resources, even if this management amounted to a transfer of resources to non-Indians. To hold otherwise the Court reasoned, would materially divest the Congress of the power to act. The Court stated that plenary authority over tribal affairs has always been exercised by Congress and that this power is a political one, not subject to the review or control of the courts.

The consequence of Lone Wolf and other like Supreme Court decisions is that most if not all constitutional challenges to federal legislation regarding Indians prove unsuccessful. As long as Congressional acts are rationally tied to the fulfillment of the trust responsibility, the Courts will let such legislation stand. In light of such federal court decisions, the trust responsibility of Congress is now viewed so broadly that it can legislate in any manner it chooses on Indian issues without much fear of violating Constitutional limitations. Since the creation of an independent oversight commission can be rationally tied to Congress’ trust responsibility to Indians (this legislation is dealing with trust reform for Indians after all), the legislation should pass constitutional muster.

Through the course of dealing between Tribes and the federal government for several centuries, Tribes have developed a unique relationship with the federal government. This unique

relationship resulted in the trust responsibility by the federal government to Indians and culminated in the legal principle that Congress has plenary control over Indian Affairs. Pursuant to this plenary power doctrine, the creation of an independent oversight commission by Congress to address trust issues, as contemplated by the Trust Reform Task Force, should withstand judicial scrutiny.

4. **UNION AND CIVIL SERVICE PROTECTIONS MUST NOT PRESENT OBSTACLES TO REFORM.**

There are many dedicated BIA and DOI employees working hard for Indian people and tribal governments. Civil service protection for these employees is an important aspect of employment for such employees. While many of these employees (a large percentage of which qualify for Indian preference) want to provide the best service possible, they lack the training and instruction necessary to properly and competently carry out trust functions. All they need is education and practical on the job experience to deliver the services mandated of a fiduciary.

Other BIA and DOI employees simply do not, or cannot, become competent to perform their required trust functions. Yet, these employees are protected by union agreements and civil service laws making their replacement at times extremely difficult. All Tribes have had the experience of dealing with incompetent or difficult government employees who negatively affect needed services. When tribal governments act to have such employees removed, many times such employees are shipped to a different location for another Tribe to deal with or the employee is transferred to a higher paying position or a position having greater authority. The civil service laws and union agreements make removing such employees from governmental service virtually impossible. In the legislation dealing with trust reform, the issue of civil service protection and incompetent employees should be scrutinized to ensure that Tribes and their members are being

provided trust services by individuals who will be held accountable for their actions.

Further, this civil service protection should not be the foundation for career-oriented, but non-dedicated, employees to derail trust reform. Employees need to have access to training and experience to properly carry out their trust functions. But once such training and instruction is provided, and employees make the conscious choice not to perform properly, or simply cannot perform properly, then these employees should be relieved of their employment and not be able to hide behind civil service laws or union agreements to protect such employment.

5. TRIBES MUST CONTINUE TO BE INVOLVED WITH THE IMPLEMENTATION OF REFORM.

Over the years, Tribal Leaders have participated in many efforts to reorganize or reform the federal government's provision of services to Indian Country. Many of these plans produced positive and concrete ideas which, if implemented, would have resulted in greatly improved delivery of services. However, none of these plans were totally employed. Once such plans were developed (most likely in a joint tribal/federal effort), implementation was left solely to bureaucrats who would be personally impacted by such reforms. Reform efforts operating under such conditions were doomed to fail.

The Trust Reform Task Force, in its participation in developing a trust reform plan, is making a real impact as to the shape of trust reform. This plan, once thoroughly developed, will result in improved trust services, but only if the plan is totally implemented. Tribal leaders must continue to have a voice in the trust reform efforts in order to compel implementation of the plan thereby ensuring the successful reform of the Bureau of Indian Affairs.

While S. 2212 calls for the creation of an Advisory Board the constituency of which will contain tribal people, the Board will simply not have the authority to mandate implementation of

any particular aspect of reform should such be necessary. The same now holds true for the Advisory Board created in the 1994 Reform Act. Complete change did not occur under the 1994 Trust Reform Act because the Board did not have the proper authority to make change happen.

The Tribal leaders on the current Trust Reform Task Force are advocating for the creation of an independent oversight commission having the authority to ensure the federal government's trust functions and fiduciary responsibilities are properly performed. This oversight mechanism will only become effective if trust reform legislation is fully implemented. Tribes, as a whole, must continue to be engaged, through the Task Force or another like body, to ensure that the entire reform plan, which includes an independent oversight commission, is completely implemented. Only thereafter can the independent oversight commission take control and provide the continuous Tribal input needed for the successful provision of trust services.

6. CONCLUSION.

The Tribal Leader/DOI Trust Reform Task Force continues to develop the crucial elements needed to bring about reform of the federal government's provision of trust services to Indian Country. Eventually, legislation will be needed to implement this reform. The Task Force envisions that the position of "Undersecretary" be created. This position will be the focal point of, and responsible for, the federal government's trust obligations. This person will have line authority over all DOI trust functions. This is similar to, but not identical with, what is contemplated in S.2212. The Task Force believes that all, not some, of the agencies within the Department of the Interior should be subject to the Undersecretary's control in relation to trust responsibilities for Indians.

Furthermore, the Tribal Leaders on the Task Force insist upon the creation of an

independent oversight commission. S. 2212 does not contain this element. If S.2212 is the vehicle to be used for trust reform, the Task Force requests that the concept of an independent oversight commission, as developed by the Task Force, be placed in such legislation.

Thank you for the opportunity to provide testimony here today on this very important topic. I will be happy to answer any questions from the Committee.

TESTIMONY OF JAMES T. MARTIN, EXECUTIVE DIRECTOR OF UNITED SOUTHERN AND EASTERN TRIBES (USET)

Before

THE SENATE COMMITTEE OF INDIAN AFFAIRS

July 30, 2002

Regarding S. 2212, the Indian Trust Asset and Trust Fund Management and Reform Act of 2002

Chairman Inouye, Vice Chairman Campbell, and distinguished members of the Senate Committee on Indian Affairs:

My name is James Martin. I am an enrolled member of the Poarch Band of Creek Indians, and serve as the Executive Director of United South and Eastern Tribes, Inc. (USET). I represent the tribes of the BIA Eastern Region on the Trust Reform Task Force (Task Force), and, along with Mr. Ross Swimmer, co-chair the Task Force Subcommittee on the EDS As-Is Business Process Modeling.

On behalf of the 24 member tribes of USET, I thank you for this opportunity to present our perspectives on Indian trust management reform. I would also like to express appreciation to the members of the Task Force (tribal and federal) for the accomplishments made to date toward the development of a structure that protects the government's fiduciary responsibility to the tribes and promotes accountability at all levels within the Department of Interior (DOI) and the Bureau of Indian Affairs (BIA). I also thank Senators McCain, Daschle and Johnson for introducing S.2212 as a mechanism to assist the Trust Reform Task Force in this monumental task.

USET brings together member tribes that operate under very different circumstances. USET member tribes vary widely in their population sizes, tribal government infrastructures, levels of economic development, and endowments of natural resources. We are deeply united, however, in our commitment to tribal sovereignty and the freedom to exercise that sovereignty through tribal self-determination. In the Eastern Region, tribes administer 95% of the government's federal Indian program responsibilities pursuant to agreements under the Indian Self-Determination and Education Assistance Act (ISDEAA) – testament to our commitment to tribal self-determination.

The tribes in the Eastern Region have engaged in frequent conversations to collectively develop approaches to trust management since Secretary Norton proposed restructuring the DOI's trust management functions last November. We first outlined our recommendations for the Secretary on February 1, when USET presented its alternative proposal to BITAM. I also testified before this Committee on February 26 at which time I outlined that proposal.

Earlier this month, the Eastern Region tribes met for a regional consultation to consider the Task Force's initial proposed options for reorganizing the DOI's Indian trust functions. The tribes in the Eastern Region unanimously and unequivocally asserted that regardless of what trust management structure is adopted, it must preserve the single point of decision-making authority at the local level for all Indian programs.

I want to emphasize this point from the outset, because the tribes in the Eastern Region insist that its significance should not be overlooked any longer. The tribes of the Eastern region have day-to-day experience showing that this aspect of the trust management system is working. Trust management reform must not impose new layers of bureaucracy on tribes at the Regional and Agency levels.

When it comes to effective delivery of the range of Indian trust services and the proper execution of fiduciary trust responsibilities, the current BIA structure that unites both trust accounting and trust services personnel at the Regional and Agency level assures that tribes have direct access and interaction with the decision-maker responsible for those programs. Based on the experience of tribes in the Eastern Region, this access is essential, whether those federal trust responsibilities are administered pursuant to self-determination contracts, self-governance compacts, or as direct services by the BIA. This structure provides a degree of "bottom-up" accountability that is as important to trust beneficiaries as the structure of the senior executive level is to the DOI. This point has been identified and articulated by USET tribes from the first day we learned of the Secretary's BITAM proposal.

We highlight Regional and Agency level access because we believe the functioning of the Eastern Region offers important lessons for the trust reform – notably, the active role of the tribes themselves in administering and carrying out Indian trust programs. In our Region, the large majority of tribes contract those functions through ISDEAA contracts, including one tribe in the Region that operates pursuant to a self-governance compact. The Eastern Regional Office provides services related to contract programs, negotiates agreements under the ISDEAA and administers Inherently Federal Functions (IFF).

At the local level we need to improve accountability and eliminate inefficiencies through improved standards, policies and procedures. A key problem is excessive delay in working through the various levels of the bureaucracy. But, to the extent tribes administer programs through 638 contracts and provided that the Regional Office is set up to offer tribes "one stop shopping" to contract those programs, the system works.

To date, the DOI representatives on the Task Force continue to demand additional layers of bureaucracy and duplicative authorities at the local level. Such a structure would impede tribal efforts by adding excessive, inefficient and costly administrative procedures to a system that is already overly bureaucratized. In order to maintain and expand tribal involvement and to enhance opportunities for tribes and Indian individuals to exercise "bottom-up" accountability, the federal government needs to streamline its trust asset management, not bureaucratize it.

Comments on Key Features of S. 2212

Senior Executive Leadership Structure. The Task Force has reached a consensus on the Senior Executive Leadership structure consistent with that proposed by S. 2212. Both the Task Force and S. 2212 elevate the senior trust executive within the DOI. The senior trust executive reports directly to the Secretary and has direct line authority over the Assistant Secretary of Indian Affairs and over the Assistant Secretaries of each of the bureaus that perform trust functions and/or administer trust assets (for example, Mineral Mining Service, Bureau of Land Management, etc). This line of authority would serve to protect the full range of trust funds and assets managed by the federal government and institute the call for a single executive to insure that the trust obligations are met.

The Task Force has selected the concept of an Undersecretary rather than a Deputy Secretary based on the view that establishing an Undersecretary would not run into the political objections that might arise with proposing what appears to be an unprecedented second Deputy Secretary within an executive Department.

To assure that trust policy is properly implemented at the Regional and Agency levels, USET has suggested that five Commissioner positions be established as civil service posts under the Assistant Secretary for Indian Affairs. [Please refer to the chart attached to my written testimony for reference]. The five commissioners (Education, Indian Services, Regional Operations, Trust Management Accounting, and Self-Determination) would have responsibility to ensure the proper execution of trust responsibilities at the Regional and Tribe/Agency level.

The Commissioner of Indian Services and the Commissioner of Trust Management would have quality assurance and oversight authority with respect to the trust functions pertaining to the Regional Director. This authority over trust functions at the Central Office to Regional Office level would parallel the Undersecretary's authority over trust functions pertaining to the Assistant Secretaries in the other DOI bureaus. Meanwhile, the line of authority over the operational responsibilities of the Regional Director would run from the Assistant Secretary to the Commissioner for Regional Operations. All 12 Regional Directors would answer directly to the Commissioner for Regional Operations. For the reasons I mentioned above, the Eastern Region tribes have urged that all trust services and resources remain at the regional level under the direction of a single line of authority.

Below the Regional Director is where the performance and authority over trust services and trust resources would divide, for example through a Deputy Regional Director for Trust Services and another for Trust Resource Management. The Agency Supervisor level would replicate this same structure – one single authority (the Agency Supervisor) with authority over ALL trust services and trust resources at the Agency level. Trust services would be separated from trust resources at the deputy supervisor level. Again, the key point is to have one individual decision-maker at each level of the bureaucracy to whom tribes have direct access. The purpose is to establish accountability driven by the beneficiaries, from the bottom up.

Elevation of the Self-Determination policy. An essential feature in elevating the senior trust executive as proposed by both the Task Force and S. 2212 involves the corresponding elevation of the policy of Indian Self-Determination. Both the Task Force and S. 2212 proposals place responsibility for self-determination contracting and compacting within the domain of the senior trust executive. While S. 2212 authorizes the Deputy Secretary to enter into self-determination contracts, the Task Force proposes the establishment of an Office of Self-Determination Policy in the office of the Undersecretary for Indian Affairs. At the strong request of the tribal representatives, the Task Force agreed that while policy formulation regarding self-determination shall be elevated to the Undersecretary level, the implementation of self-determination agreements must remain at the level most appropriate to ensure tribes the greatest access.

Independent Oversight. Both S. 2212 and the Trust Reform Task Force coincide in the view that establishing accountability for the DOI's trust management requires independent oversight. S. 2212 places the Deputy Secretary in charge of an Office of Trust Reform Implementation and Oversight to supervise and direct day-to-day activities regarding the trust responsibility. S. 2212 also provides for beneficiary involvement in that oversight effort through a board that would "provide advice on all matters within the jurisdiction of the Office of Trust Reform."

The Task Force has not reached consensus regarding the scope of powers to be delegated to an independent oversight commission. Both tribal and federal representatives agree that the commission should have powers to audit trust accounts, investigate allegations of accounting failures and agency action inconsistent with the trust responsibility, and analyze budgetary needs.

There also appears to be general agreement that the oversight commission would provide quality assurance and accountability through the Undersecretary for Indian Affairs and down the chain of command. Quality assurance is understood to be a trust management oversight function, not administration or implementation. Additionally, like S. 2212, the Task Force proposes a key role for the beneficiaries in the oversight body. For example, a majority of the members of the commission would be members of federally recognized tribes. In considering nominees, due consideration will be given to qualified individuals who have resources held in trust by the United States.

The tribal and the federal representatives disagree as to the nature of the commission's enforcement authority and regarding the delegation of rulemaking authority. I have agreed to co-chair a Task Force sub-workgroup to seek a resolution of these differences.

To sum up the differences, the federal representatives have suggested that the commission should exercise its enforcement authority by referring findings of non-compliance to the Treasury Department's Comptroller of the Currency for it to determine what sanctions and/or remedies to apply. Tribes wish to empower the commission with the range of enforcement mechanisms available to the Comptroller, so as to retain full discretion and authority to independently take enforcement action. As to rulemaking authority, the tribes have proposed that the one of the principal features of the commission would be rulemaking authority to promulgate trust management standards without Secretarial interference. The federal representatives have objected to having a commission assume any of the Secretary's rulemaking authority.

I hope that the Task Force can come back to you quickly with suggestions on how to proceed with legislation regarding the independent commission.

Let me also note that while S. 2212 retains and rebuilds the Office of the Special

Trustee (OST), the view of the tribes of the Eastern Region is that the commission would assume most of the functions now charged to the OST. We believe legislation will be required to provide for a transition of functions from the OST to the independent commission.

Establishing Clear Trust Standards. In testimony before this Committee last month, the Deputy Secretary of the Department of Interior stated that he was not able to define the standard governing the Indian trust responsibility. The tribal members of the Task Force and the Eastern Region Tribes urge this Committee that the time has come for Congress to establish statutory standards governing the trust responsibility. If the senior level official responsible for overseeing the trust responsibility is not able to articulate the standard, the DOI is not well positioned to execute that responsibility.

A starting point for legislating this definition can be found in the DOI's own policy manual which provides Department-wide *guidance* for carrying out the Secretary's trust responsibility. In Part 303, section 2.7, the Departmental Manual states its Trust Principles in the following terms: "it is the policy of the Department of the Interior to discharge, without limitation, the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty." Those principles further provide that:

The proper discharge of the Secretary's trust responsibilities require that persons who manage Indian trust assets:

- A. Protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste, and depletion;
- B. Assure that any management of Indian trust assets that the Secretary has an obligation to undertake promotes the interest of the beneficial owner and supports, to the extent it is consistent with the Secretary's trust responsibility, the beneficial owner's intended use of the assets.

And the list continues by spelling out eleven more trust duties. I refer the Committee to the Departmental Manual.

The tribal representatives on the Task Force believe that the Secretary's accountability for the trust responsibility would markedly improve if legislation modeled on this "guidance" in the Departmental Manual were enacted into law to provide a basic definition of the trust responsibility and the Secretary's corresponding duties to carry out that responsibility. As discussed above, we believe that rulemaking to further develop trust standards would be a significant role of the independent commission.

The tribes have discussed the possibility of permitting the development of separate standards governing tribal implementation of trust duties. The idea that tribal standards might be different from the Secretary's does not imply that the standards would be lower. Rather, the separate standards simply acknowledge that different policy considerations are at play. For instance, rather than a standard requiring that the resource be leased for its highest market value, a tribal standard may be to assure the resource's protection and preservation in order to fully reflect the asset's cultural or spiritual value. From the perspective of USET member tribes, the proper execution of the trust responsibility is achieving a balance that maximizes the utilization of trust resources and protects those trust resources for future generations.

Assure Adequate Funding. No structure can work without sufficient resources to drive it. Trust resource management programs, like trust service programs, have been

under-funded for years. Lack of funding and personnel (particularly at the Regional level) account for a significant portion of the Secretary's failure to properly discharge the federal government's trust duties.

The amount of new money required for trust reform may be substantial. Such funds may well represent an investment in protecting the United States from future liability. Nevertheless, even though the need for trust reform is great and may require some redirection of resources, we ask this Committee to assure that trust reform funding not adversely affect existing programs.

We also ask the Committee, in reviewing the Task Force's proposal, to bear in mind that new structures and functions will replace existing offices within the DOI. I've already mentioned that the independent commission would assume many of the OST's functions and would eliminate that office. Resources currently available to the OST could then be made available to the oversight commission. Additionally, the President has proposed significant budgetary increases for trust reform. Where those additional dollars will flow, however, has not been fully discussed. We believe they should be targeted to the trust reform efforts currently being proposed by the Trust Reform Task Force, not to the structure developed last November to implement the Secretary's now withdrawn BITAM proposal.

Thank you very much. I look forward to answering any questions you may have for me.

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